TABLE OF CONTENTS.

TABLE OF CASES.

Table of Cases.—Continued.

No. 638.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

QUONG HAM WAH COMPANY,
Plaintiff-in-Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, AND A. J. PILLSBURY, WILL J. FRENCH AND MEYER LISSNER, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION, OWE MING, AND ALASKA PACKERS' ASSOCIATION, A CORPORATION,
Defendants-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA.

STATEMENT OF THE CASE.

Owe Ming was injured on July 30, 1918, at Cooks Inlet, Alaska, while working in a cannery of the Alaska Packers' Association as a machine tender. His immediate employer at the time was plaintiff-in-error Quong Ham Wah Company, to which the Alaska Packers' Association had sublet the procuring of laborers and a portion of the cannery work.

Plaintiff-in-error, like other California concerns, regularly recruits laborers in said state for the Alaskan fisheries. These laborers are taken from California with the fishing fleets in the spring and returned to California in the fall at the close of the season. At the time of his injury Owe Ming was a resident of California, and his contract of hire for the season's work in the canneries was made in California. After his injury he returned to California and, while disabled there, filed his claim with the California Industrial Accident Commission. The application was regularly heard and determined and an award made in favor of the applicant, which award is here under review.

Said award was made under the authority of section 58 of the California Workmen's Compensation, Insurance and Safety Act of 1917 (chapter 586, California Laws 1917), which reads as follows:

> "Sec. 58. The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The only contention made by plaintiff-in-error is the alleged repugnance of section 58 above to the constitution of the United States. This contention is two-fold in character.

1. That section 58 of the California Workmen's Compensation Act violates article IV, section 2 of the United States constitution, in that it contains an unwarranted discrimination between employees resident in California, and employees not so resident, amounting to a discrimination against the citizens of the several states.

2. That section 58 violates the "equal protection of the laws" clause of the Fourteenth Amendment to the federal constitution, for the same reason.

HISTORY OF THE CASE BELOW.

These two contentions were first presented to the Supreme Court of California in the case of *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767, 177 Pac. 848. There the attack was in fact made upon section 75 of an earlier workmen's compensation act (chapter 176, California Laws 1913), but as section 75 was carried over into the present workmen's compensation act as section 58, by reenactment without change, the statutory provisions considered are identical. In the above case the Supreme Court of California upheld the section against the attacks herein made, upon the preliminary point that an employer, not being a member of the class aggrieved by the alleged unconstitutional feature, could not raise the constitutional question.

In the present case this attack was renewed upon the same grounds. In its first decision herein (59 Cal. Dec. 18, apparently not reported elsewhere),

the Supreme Court of California reversed its holding in the Estabrook and Klamath Steamship Company cases, holding that the employer was privileged to attack the section. It went on to hold that such discrimination violated article IV, section 2, of the federal constitution by discriminating against nonresidents, and that the effect of such violation was to render the entire section void, thereby depriving resident employees of the protection of the section as well as nonresidents. Owe Ming, the injured employee in the present case, was a resident of California within the meaning of section 58 at the time of his injury.

A petition for rehearing was filed by counsel for the Industrial Accident Commission and granted by the California Supreme Court. In its decision upon rehearing, the decision here under review, the California court again held that the employer could raise the constitutional question, and that section 58 of the California act violated article IV, section 2, of the United States constitution, but went on to hold that the effect of such violation was to extend the privilege of section 58 to nonresident employees by force of the United States constitution, *ex proprio vigore,* instead of to invalidate the entire section and deprive resident employees of its benefits. Section 58 was accordingly upheld. This decision was based upon an earlier decision of the same court in *Estate of Johnson,* 139 Cal. 532, 73 Pac. 424, 96 A.S.R. 161.

The decision on rehearing of the California Supreme Court now comes to this court on writ of error.

OUTLINE OF CONTENTIONS.

Stating our contentions in the order in which this court will probably desire to consider them, our position is as follows:

PRELIMINARY CONSIDERATIONS.

1. Authorities sustaining the extraterritorial force of state workmen's compensation acts generally.

2. Considerations of policy underlying the extraterritorial application of state workmen's compensation acts.

ARGUMENT.

1. The judgment of the Supreme Court of California in this case should be affirmed upon the ground first assigned by that court in *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767, 177 Pac. 848, and, we contend, erroneously overruled in the present case. Said ground is:

> *Ground:* An employer, not being a member of the class discriminated against, cannot raise the constitutional question of alleged discrimination between resident and nonresident employees.

2. The judgment of the Supreme Court of California should be affirmed upon the ground assigned by that court in the present case, which is:

> *Ground:* Assuming that section 58 of the California act contravenes article IV, section 2, of the constitution of the United States by withholding its privileges from nonresidents, the effect of such contravention is to extend such privilege to such

nonresidents by the force of article IV, section 2, *ex proprio vigore,* and not to take away the benefits of said section 58 from resident employees.

3. Section 58 of the Workmen's Compensation, Insurance and Safety Act of the State of California does not violate article IV, section 2, of the constitution of the United States.

4. Similarly, section 58 of the California Workmen's Compensation Act does not violate the "equal protection of the laws" clause of the Fourteenth Amendment of the United States constitution.

PRELIMINARY CONSIDERATIONS.

I.

POWER OF THE STATES TO GIVE EXTRATERRITORIAL SCOPE TO WORKMEN'S COMPENSATION ACTS.

Apparently the power of the legislatures of the different states to give extraterritorial effect to state workmen's compensation acts, there being no question of discrimination involved, has never been questioned. Such power is not attacked by plaintiff-in-error in the present proceeding.

Some of the cases establishing the power of the states to give extraterritorial effect to statutes of this type are:

North Alaska Salmon Co. vs. *Pillsbury et al.,* 174 Cal. 1, 162 Pac. 93 (dictum);

Kennerson vs. *Thames Towboat Co.,* 89 Conn. 367, 94 Atl. 372;

Industrial Commission vs. *Ætna Life Insurance Co.*, 64 Colo. 480, 174 Pac. 589;
Friedman Mfg. Co. vs. *Industrial Commission of Illinois*, 284 Ill. 554, 120 N. E. 460;
Ruck vs. *Chicago Railway Co.*, 153 Wis. 158, 140 N. W. 1074;
Hagenback vs. *Leppert* (Ind.), 117 N. E. 531;
Pierce vs. *Bekins Van and Storage Co.* (Ia.), 172 N. W. 191;
Mulhall vs. *Fallon*, 176 Mass. 266, 57 N. E. 386;
In re Gould, 215 Mass. 480, 102 N. E. 693 (dictum);
State vs. *Dist. Ct.*, 139 Minn. 205, 166 N. W. 185;
State vs. *Dist. Ct. of Rice Co.* (Minn), 168 N. W. 177;
Rounsaville vs. *Central Railroad Co.*, 87 N. J. 371, 94 Atl. 392;
Deeny vs. *Wright & Cobb Lighterage Co.*, 136 N. J. L. J. 121;
Post vs. *Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351;
Grinnell vs. *Wilkinson*, 39 R. I. 447, 98 Atl. 103;
Gooding vs. *Ott*, 77 W. Va. 487, 87 S. E. 863;
Foughty vs. *Ott* (W. Va.), 92 S. E. 143;
Anderson vs. *Miller Scrap Iron Co.*, 169 Wis. 106, 170 N. W. 275.

The difference between elective and compulsory workmen's compensation acts, as bearing upon their extraterritorial effect, is well illustrated in *North Alaska Salmon Co.* vs. *Pillsbury et al.*, 174 Cal. 1, 162 Pac. 93.

An excellent annotation on the entire subject of extraterritorial effect of workmen's compensation acts is contained in 3 A. L. R. 1351 N.

II.

CONSIDERATIONS OF PUBLIC POLICY UNDERLYING EXTRATERRITORIAL EFFECT OF WORKMEN'S COMPENSATION ACTS.

Workmen's compensation acts are economic and sociological in character rather than juridical, and are to be construed so as to fulfill their purposes.

The principal purposes of all workmen's compensation acts are:

1. To secure greater social justice to wage earners by mitigating the hardships resulting from industrial injuries.

2. To protect the community against the direct and indirect consequences of poverty to the extent that it may be caused by industrial injuries.

By an industrial injury is meant the crippling or killing of a wage-earner by accident or injury occurring in the course of his employment. The effect of such industrial injury is to suspend the income, temporarily or permanently, of the injured workman, his family, or both, as such income depends upon the ability of the workman to earn wages. To suspend this income is to leave the workman or his family without their usual source of support, and hence to impoverish them. Industrial injuries are one of the principal sources of poverty. Poverty is more than a personal misfortune, it is a social evil as well, against which society and the state is entitled to protect itself. Human wastage in industry is a

harm to the state, as well as to the individuals directly concerned.

The direct consequences of poverty, produced in part by industrial injury, are that the workman or his family, or both, become dependent upon friends, relatives, public institutions or charity.

The indirect consequences of such poverty are even more harmful to the parties affected and to the community in which they reside than the direct consequences, but being less easily measured are less frequently noticed. Some of these indirect consequences are (1) lowering of the standard of living and morale of the family through loss of economic independence; (2) forcing of children to work at too early an age, with insufficient education, training or strength, which results in a tendency towards delinquency, lowered physical and mental vitality, increased susceptibility to disease, weakening of the next generation and a tendency toward the degeneration of a portion of the people who make up the body of the community; (3) the virtual crushing, by economic necessity, of the mother who tries to keep the family together; (4) the tendency toward crime, prostitution, alcoholism and other forms of delinquency which may result from the poverty of the family. Delinquency is more often a result than a cause of poverty.

With these observations in mind, the reason for the extraterritorial effect of workmen's compensation acts becomes apparent. Where the injury occurs

within the state it is conceded that the state may protect itself and its residents against these direct and indirect consequences of industrial injury, the social, as well as the immediate personal consequences of the injury being entitled to consideration.

N. Y. Cent. R. Co. vs. *White,* 243 U. S. 188, 61 L. Ed. 667;
Western Indemnity Co. vs. *Pillsbury et al.,* 170 Cal. 686, 151 Pac. 398.

The same consequences, to a less but still a substantial extent, flow where the injury occurs outside the state and the injured workman or his dependents are within the state during their period of adversity or dependency. It is part of the function and duty of a state to protect its citizens and residents, its common welfare and its public interests against harm. It is immaterial whether such harm be occasioned either by injuries occurring within or without the state, so long as the burden falls upon the citizens or residents of the state or the state itself.

To illustrate. In the present case, labor is recruited in California during the spring for work in the Alaska fisheries during the open season, to be returned to California at the end of the season. Workmen who are crippled in the course of such work in Alaska are returned to California either on the next vessel after the injury or when the uninjured workers return, and such workmen affect the interests of California from and after their return to as great an extent as if they had been injured within the state.

If a workman be killed in Alaska in the course of the fishing season, he may leave a widow and orphans in California, in which case the interests of California are as much affected as though the fatal injury had occurred within the state. If such workmen, though not killed, have families in California, and are prevented by their injuries, either for a temporary period or permanently, from supporting their dependents, the burden upon the state is greater for the period of their incapacity than if they had been killed.

To illustrate again. Many traveling salesmen are hired in California, reside in California, and have their families in California, but travel through a number of Western states in the course of their work. An injury to such salesman in any state affects the welfare of the State of California, its citizens and residents to just as great an extent as if the injury occurred in California.

Another illustration. Men are frequently recruited in California for large construction jobs, such as building railroads, electric power plants, etc., carried on in other Western states. These men have their homes in California and frequently have families or other dependents permanently residing in California. Injuries to such workmen abroad affect the interests of citizens and residents of the state and the welfare of the community in which they reside as much as if such injuries occurred within California.

Every state protects its citizens and residents while abroad, not only because of state pride, but also

because the state is affected by misfortune to its citizens and residents.

Upon grounds of expediency, also, the extraterritorial scope of a workmen's compensation act is advisable for all parties. In the case of an employer who conducts a considerable portion of his business in California, but has employees traveling outside the state, it is a benefit to him to be able to insure his entire business under the law of California under one insurance policy, rather than take out separate insurance policies in every foreign state in which any of his men may go on business. For instance: The "A" company has its principal place of business and most of its employees in California but sends traveling representatives to Oregon, Washington, Idaho, Montana and Nevada. This concern informs us that it urgently desires to cover all its employees in one insurance policy under the California Workmen's Compensation Act, rather than to comply with the separate requirements of five different states. All of its traveling employees have their places of permanent residence and headquarters in California.

The same is true to a large extent of the Alaska fisheries. These canneries are usually located at points in Alaska remote from hotels, cities and courts. It is an inconvenience to the employer to maintain attorneys and hold witnesses at Alaska courts in towns remote from their canneries for litigation when, in the natural order, all parties would return to California at the conclusion of the season. It is

more convenient for the employer to apply the law of California to his entire enterprise.

The same motives of expediency and convenience apply to injured employees. It is difficult, if not impossible, for such employees to remain in Alaska and keep witnesses there awaiting litigation. They, quite naturally, prefer to return to their homes during their incapacity rather than remain in a strange locality awaiting the outcome of pending litigation, which may be long drawn out.

The only other possibility open to such employer or employee is a suit in the courts of California under the laws of Alaska. This is less desirable to all parties than to apply the California Workmen's Compensation Act in the California tribunal, for the following reasons:

(*a*) The parties may be compelled to operate under a number of different foreign laws with which they are not familiar.

(*b*) Such foreign laws could not be enforced in California before respondent Industrial Accident Commission, as its jurisdiction is limited to the application of the California Workmen's Compensation Act. As between the California Commission and the California courts, the Commission affords a remedy, which for speediness and inexpensiveness, is very much preferable to that afforded by the courts.

(*c*) If a workmen's compensation act of Alaska be applicable, procedural questions immediately develop as to whether it could be enforced in a California tribunal, or in any tribunal outside of Alaska.

If it be an elective act, it would be difficult to establish an election under it as the parties are hired in California and other Pacific Coast states and not in Alaska.

Mainly because of the reasons stated above, most of the forty-three states now having workmen's compensation acts have given extraterritorial scope to such acts in one way or another.

ARGUMENT.

I.

THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IN THIS CASE SHOULD BE AFFIRMED UPON THE GROUND FIRST ASSIGNED BY THAT COURT IN ESTABROOK STEAMSHIP CO. AND KLAMATH STEAMSHIP CO. vs. INDUSTRIAL ACCIDENT COMMISSION, 177 CAL. 767; 177 PAC. 848, AND, WE CONTEND, ERRONEOUSLY OVERRULED IN THE PRESENT CASE. SAID GROUND IS:

> *Ground*: An employer can not attack a statute upon the constitutional ground of alleged discrimination between resident and nonresident employees, as he is not a member of the class aggrieved by the discrimination. One who does not belong to the class that might be injured by the alleged unconstitutional feature of a statute cannot raise the question of its validity.

The plaintiff-in-error is an employer of labor, and is here attacking the constitutionality of section 58 of the California Workmen's Compensation Act upon

the ground that it contains an illegal discrimination between certain classes of employees injured outside the state, i. e., employees who are nonresidents and who are residents of California at the time of their injury. It is not privileged to make this attack as it is not a member of the class alleged to be discriminated against.

The Supreme Court of California so held, the first time the questions here raised came before it, in *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767; 177 Pac. 848. As this opinion is short and squarely in point, we are printing it in full for the convenience of the court in the appendix to this brief as Exhibit "A" and respectfully call the attention of the court to it.

Subsequently, and in the present proceeding, the personnel of the California Supreme Court having changed in the meantime, the decision in the foregoing case was overruled. We contend that the original position of the California court was correct.

This court has ruled steadfastly and uniformly, without recognizing any of the exceptions attempted to be drawn by the California Supreme Court in the present case, that a person not a member of the class alleged to be discriminated against, cannot raise the constitutional question.

Arizona Copper Co. vs. *Hammer*, 250 U. S. 400;
Aitken vs. *Kingsbury*, 247 U. S. 484, 489, 62 L. Ed. 1226;

Mountain Timber Co. vs. *Washington*, 243 U. S. 219, 61 L. Ed. 685;
Hendrick vs. *Maryland*, 235 U. S. 610, 623, 59 L. Ed. 385, 391;
Jeffrey Mfg. Co. vs. *Blagg*, 235 U. S. 571, 59 L. Ed. 364;
Erie R. R. Co. vs. *Williams*, 233 U. S. 685, 58 L. Ed. 1155;
M. K. and T. Ry. vs. *Cade*, 233 U. S. 642, 648, 58 L. Ed. 1135;
Plymouth Coal Co. vs. *Pennsylvania*, 232 U. S. 531, 58 L. Ed. 713;
Darnell vs. *Indiana*, 226 U. S. 390, 398, 57 L. Ed. 267;
Citizens National Bank vs. *Kentucky*, 217 U. S. 443, 453, 54 L. Ed. 832;
Hatch vs. *Reardon*, 204 U. S. 152, 51 L. Ed. 415;
Lee vs. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106;
Covington vs. *First National Bank*, 198 U. S. 100, 49 L. Ed. 963;
Spraigue vs. *Thompson*, 118 U. S. 90, 30 L. Ed. 115;
Bozeman vs. *State*, 63 Ala. 201, 61 So. 604;
Scott vs. *Nashville Bridge Co.* (Tenn.), 223 S. W. 844.

It has also been the rule in California until the present case.

Murphy vs. *State of California*, 8 Cal. App. 440, 97 Pac. 199 (affirmed in 225 U. S. 625, 55 L. Ed. 1032);
Estate of Johnson, 139 Cal. 532, 73 Pac. 424;
Estabrook Steamship Co. and Klamath Steam-

ship Co. vs. *Industrial Accident Commission, supra,* 177 Cal. 767, 177 Pac. 848;
Estate of Damon, 10 Cal. App. 542, 102 Pac. 684;
Ritz vs. *Lightson,* 10 Cal. App. 685, 689, 103 Pac. 363.

In *Jeffrey Mfg. Co.* vs. *Blagg,* 235 U. S. 571, 59 L. Ed. 364, a workman's compensation case, this court said:

"Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employee in a shop with five employees with those having less. *No employee is complaining of this act in this case.* The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive, for it is the well settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality *in the feature complained of. Southern Ry.* vs. *King,* 217 U. S. 524, 534; *Engel* vs. *O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co.* vs. *Wright,* 225 U. S. 540, 550; *Yazoo & M. Valley R. Co.* vs. *Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal* vs. *New York,* 226 U. S. 260, 271; *Darnell* vs. *Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co.* vs. *Pennsylvania,* 232 U. S. 531, 544; *Missouri, K. & T. R. Co.* vs. *Cade,* 233 U. S. 642, 648." (Italics ours.)

In the first decision below in the present case, Mr. Justice Wilbur dissented, holding that the employer (plaintiff-in-error here) was not privileged to raise the constitutional point. In the decision upon rehearing he adhered to the same position, although concurring in the result upon the other ground. His dissenting opinion on the first decision contains a more able exposition of our position upon this point than any we can present, and we accordingly incorporate the relevant portions of it in this brief as Exhibit "B" in the Appendix and respectfully direct the attention of the court to it.

In the case at bar the court below allowed the employer to raise the constitutional question upon the theory that the case fell within each of two exceptions to the rule, such exceptions being established in the cases of *Greene* vs. *State*, 83 Neb. 84, 119 N. W. 6, and *Buchanan* vs. *Worley*, 245 U. S. 60, 72, 60 L. Ed. 149, respectively. This necessitates a brief consideration of these two cases, although plaintiff-in-error now seems to rely only upon the second of the two cases.

(*a*) *Greene* vs. *State*.

In addition to the points made in Mr. Justice Wilbur's dissenting opinion we attack the soundness of the holding in *Greene* vs. *State*, *supra*, upon the following grounds:

1. The case stands alone. So far as we can ascertain, its doctrine has never been approved by this court, nor sustained upon square consideration of

the question by any other court, with the exception of the present case below.

2. The rule of *Greene* vs. *State,* that where no member of the class affected by the discrimination is in a position to raise the constitutional question, any person affected thereby can do so, is squarely opposed to the long continued and uniform line of decisions of this court, some of which have been cited above, and to the principle upon which they are based.

This court states the rule without qualification or exception.

> "Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto. *Hatch* vs. *Reardon,* 204 U. S. 152, 161; *Williams* vs. *Walsh,* 222 U. S. 415, 423; *Collins* vs. *Texas,* 223 U. S. 288, 295, 296; *Missouri, K. & T. Ry. Co.* vs. *Cade,* 233 U. S. 642, 648, and cases cited."
>
> *Hendrick* vs. *Maryland,* 235 U. S. 610, 623, 59 L. Ed. 385, 391.

3. The doctrine of *Greene* vs. *State* is squarely opposed to the ruling of this court that only a person who is injuriously affected by the *alleged unconstitutional feature* can attack the constitutionality of a statute. He must be injured by the *discrimination* itself and not merely by the legislation as a whole as a possibly invalid act. Stated in another way, the statute which he is attacking must deprive him, not someone else, of a constitutional right.

We quote at random from decisions of this court:

"The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. *He must show that the alleged unconstitutional feature* of the law injures him, and so operates *as to deprive him* of rights protected by the Federal constitution.' *Southern Ry. Co.* vs. *King,* 217 U. S. 524, 534. See also *Tyler* vs. *The Judges,* 179 U. S. 405; *Turpin* vs. *Lemon,* 187 U. S. 51, 60; *Hooker* vs. *Burr,* 194 U. S. 415; *Hatch* vs. *Reardon,* 204 U. S. 152, 160; *Collins* vs. *Texas,* 223 U. S. 288, 295." *Standard Stock Food Co.* vs. *Wright,* 225 U. S. 540, 550, 55 L. Ed. 1197, 1201. (Italics ours.)

"But if it be assumed—an assumption not sustained by any decision of the Kentucky Court of Appeals—that the third section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be made by one *unaffected by the alleged invalid feature. Austin* vs. *Boston,* 7 Wall. 694; *Albany County* vs. *Stanley,* 105 U. S. 305; *The Winnebago,* 205 U. S. 354." *Citizens National Bank* vs. *Kentucky,* 217 U. S. 443, 453, 54 L. Ed. 832, 836. (Italics ours.)

The mere fact that a defendant is made to suffer the penalties of an alleged invalid statute is not a

sufficient interest to enable him to plead the unconstitutionality of the statute. This has been held by this court in many cases, including the following, in which the penalties of the law were enforced, even though the law might be held unconstitutional if attacked by a proper party. So in the present case, the fact that plaintiff-in-error will have to pay a judgment of $464.85 does not give it a sufficient interest to attack the statute.

Murphy vs. *State of California*, 225 U. S. 625, 55 L. Ed. 1032;
Erie R. R. Co. vs. *Williams*, 233 U. S. 685, 58 L. Ed. 1155;
Lee vs. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106;
Citizens National Bank vs. *Kentucky* (*supra*), 217 U. S. 443, 54 L. Ed. 832;
Hendrick vs. *Maryland*, 235 U. S. 610, 59 L. Ed. 385, 391;
State vs. *Haskell*, 84 Vt. 429, 79 Atl. 852.

In the present case, plaintiff-in-error has no further interest in the subject matter of the statutory provision under attack than that the entire statute may be enforced against it. Being an employer, it is not injuriously affected by the discrimination between resident and nonresident employees injured extraterritorially. No right of the employer, secured by the United States constitution, is violated by such discrimination between classes of employees. Plaintiff-in-error therefore has no sufficient interest in the question of discrimination to permit it to attack the statute upon this ground and *Greene* vs. *State* is wrong if it holds to the contrary.

4. Applied to the specific grounds of invalidity urged in the present case, the invalidity of the exception claimed by the court below is still further apparent. It is established by the decisions of this court, as pointed out in the next subdivision of this brief, that neither article IV, section 2, nor the "equal protection of the laws" clause of the Fourteenth Amendment to the federal constitution, have the effect of circumscribing the power of the states to legislate concerning their own citizens, where the question of discrimination between citizens and non-citizens is involved. The effect of these constitutional provisions is to secure equality of treatment to non-citizens or residents, not to restrict the state in dealing with its own residents.

Slaughter House Cases, 16 Wall. (83 U. S.), 36, 77, 21 L. Ed. 394;

State vs. *Swanson,* 182 Ind. 582, 107 N. E. 275;

U. S. vs. *Wheeler,* 41 S. Ct. 133.

Hence a citizen of a state cannot complain of a statute of his own state, no other feature of invalidity being alleged, upon the ground that such statute discriminates against citizens of other states.

McCarter vs. *Hudson County Water Co.,* 70 N. J. Eq. 696, 65 Atl. 489, 492.

(*b*) *Buchanan* vs. *Worley.*

The other case relied upon below and the only case relied upon here is *Buchanan* vs. *Worley,* 245 U. S. 60, 62 L. Ed. 149. This case can be disposed of in a few words. The validity of the ordinance in that case was attacked upon two grounds, as shown by

the excerpts from the brief contained in the official report of the case and by the opinion of this court, as follows: (1) That the ordinance in question interfered with a property right of the plaintiff secured by the "due process" clause of the Fourteenth Amendment, i. e., the right to sell his property in an open market, without restriction as to character or color of possible purchasers; (2) That it contained an unconstitutional discrimination against colored and white persons and thus denied colored persons the equal protection of the laws.

The court below in the present case assumed that *Buchanan* vs. *Worley* warranted an exception to the rule that only a member of the class discriminated against could raise the constitutional question, as plaintiff-in-error, a white person, there was held entitled to attack the ordinance. It clearly appears from the opinion of this court, however, that no such exception was created, as the case went off upon the other ground of attack. It was not held that a white man could raise the question of *discrimination* against negroes. It was instead held that the ordinance was not a legitimate exercise of the police power and deprived a white owner of land of a property right (the right to sell his property in an open market) in violation of the "due process" clause of the Fourteenth Amendment. It therefore establishes no exception in point in the present case.

II.

THE JUDGMENT BELOW SHOULD BE AFFIRMED UPON THE GROUND ASSIGNED BY THE SUPREME COURT OF CALIFORNIA IN THE PRESENT CASE, WHICH IS:

> *Ground:* If section 58 of the California act contravenes article IV, section 2 of the federal constitution, the effect is not to strike down the grant of the statutory privilege of section 58 to residents, but is instead to extend the privilege to nonresidents by the force of the constitutional provision.

Usually, where a statutory provision contravenes the constitution, the effect is to nullify the entire provision. There are exceptions to this rule. Sometimes the constitutional mandate is vindicated in other ways, depending upon the object to be secured. For instance, in the present case the object sought to be accomplished by article IV, section 2, of the federal constitution is to secure equality of treatment to citizens of other states. Where, as here, the statute in question confers a special privilege upon its own citizens and residents, without extending it to nonresidents or noncitizens, the simplest and most effective way of vindicating the federal constitution is to give such privilege directly to the citizens of the other states, rather than to go through the roundabout method of destroying the grant to residents, leaving it to the legislature to re-enact the section in a different form. The former, we contend, is the effect of article IV, section 2, in the present case.

The principal authority in support of our position is the decision of the Supreme Court of California in *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424. As the opinion in this case is the fullest and clearest statement of the rule in any decision yet rendered upon the question, we have incorporated it in this brief as Exhibit "C" in the Appendix. It is difficult, if not impossible, to state our position in any better language than that contained in *Estate of Johnson*, and we therefore request the court to consider the points made in that opinion as if made in detail in our brief proper.

We also attach, for the convenience of the court, as Exhibit "D" in the Appendix, those portions of the main and concurring opinions below in the present case relevant to the question here under discussion.

The rule of *Estate of Johnson* has been approved, sometimes with and sometimes without comment upon the principle involved, in the following cases, in which privileges granted by a state to its residents were extended by the courts to nonresidents.

Wiley vs. *Parmer*, 14 Ala. 627, 629, 631;
Doe vs. *Roe* (Ala), 51 So. 991;
Black vs. *Seal*, 6 Houst. (Del.) 541;
State vs. *Swanson*, 182 Ind. 582, 107 N. E. 275;
Roby, Trustee, vs. *Smith et al.*, 131 Ind. 342;
State vs. *District Court*, 126 Minn. 501, 148 N. W. 463;
Steed vs. *Harvey*, 18 Utah 372, 54 Pac. 1011;
Sprague vs. *Fletcher*, 69 Vt. 69, 37 Atl. 239;

Deatricks Admr. vs. *State Life Ins. Co.* (Va.), 59 S. E. 489;
Konkel vs. *State,* 168 Wis. 335, 170 N. W. 715;
Eingartner vs. *Illinois Steel Co.,* 94 Wis. 70, 68 N. W. 664;
Shirk vs. *City of La Fayette,* 52 Fed. 857;
Detroit vs. *Osborne,* 135 U. S. 492, dictum p. 498, 34 L. Ed. 260.

See 11 Federal Statutes Annotated, 2d ed., pp. 231-2, where the doctrine of *Estate of Johnson* is adopted without reservation.

The decisions of this court upon which the rule of *Estate of Johnson* was based are as follows:

Slaughter House Cases, 16 Wall (83 U. S.) 36, 77, 21 L. Ed. 394;
Blake vs. *McClung,* 172 U. S. 239, 258, 259, 43 L. Ed. 432;
Cole vs. *Cunningham,* 133 U. S. 107, 113-4, 33 L. Ed. 538;
U. S. vs. *Wheeler,* 41 S. Ct. 133;
Ward vs. *Maryland,* 12 Wall. (79 U. S.) 418, 430, 20 L. Ed. 449;
Paul vs. *Virginia,* 8 Wall. (75 U. S.) 180, 19 L. Ed. 357;
Detroit vs. *Osborne,* 135 U. S. 492, 498, 34 L. Ed. 260.

Our detailed contentions upon this point are as follows:

1. ARTICLE IV, SECTION 2, OF THE UNITED STATES CONSTITUTION IS A CONSTITUTIONAL GRANT OF PRIVILEGES TO CITIZENS OF THE SEVERAL STATES AND NOT A MERE PROHIBITION UPON THE LEGISLATIVE POWER OF THE STATES. IT IS SELF-EXECUTING AND NOT MERELY RESTRICTIVE.

(*a*) *The Language of Article IV, Section 2.*

This appears from the language of article IV, section 2, subdivision 1, which reads:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The words "shall be entitled" are words of grant. They affirmatively confer upon noncitizens of a state certain privileges and immunities of citizenship which the state confers upon its own citizens. If the provision were intended merely to prohibit discriminatory legislation by the state, without affirmatively securing privileges and immunities to citizens of the several states, its language would have been somewhat to this effect:

> "No state shall ever grant any privileges or immunities to its own citizens, unless granted upon the same terms to the citizens of the several states."

The failure to use any such language of prohibition shows that the purpose of the constitutional provision is to *confer* and *communicate* privileges to the

citizens of the several states, and not merely to restrict the power of each state, by invalidating *in toto* any legislation which failed to give to citizens of other states their due.

Being a constitutional grant, article IV, section 2, is self-enforcing. It does not need state legislation to complete its effectiveness. Therefore, if section 58 of the California Workmen's Compensation Act contravenes this constitutional provision, the result is that nonresidents of California are entitled by the force of the constitutional provision, to privileges given by section 58 to residents of California.

(*b*) *The Context of Article IV, Section 2.*

This conclusion is reinforced by noting the arrangement of the United States Constitution, and the context of the provision in question. Limitations, as such, upon the legislative power of the states are collected together in article I, section 10 of the constitution. Under article I, section 10, any contravening state legislation is invalid in its entirety, by the force of the constitutional prohibition.

But in article IV the subject matter of the four regulatory provisions contained in sections 1 and 2 of this article (the remainder of article IV dealing with matters here irrelevant) is of an entirely different nature. The four regulatory provisions are not primarily prohibitory in character, but instead primarily regulate directly the rights and subject matter with which they deal, without the intervention of state enforcing agencies. All four provisions are

direct grants of rights, privileges and immunities, binding upon the individuals and subject matter affected.

For instance, section 1 of article IV *confers* full faith and credit upon public acts, etc., of the different states. It does not state that every state shall by legislation confer such full faith and credit upon the public acts of other states. Neither is it merely prohibitive, striking down legislation which denies full faith and credit. It *confers* full faith and credit *ex proprio vigore* upon the public acts, etc., in question.

Similarly, subdivisions 2 and 3 of section 2 of article IV, contained in the same section and immediately following the provision invoked in the present case, dealing with fugitives from justice and fugitive slaves, operates and operated directly upon the subject matter and private rights involved, and not primarily upon or through the legislative power of the states.

The contention of plaintiff-in-error in the present case is that article IV, section 2, does not extend the privileges of section 58 of the California Workmen's Compensation Act to nonresidents of California, because the legislature of California has not authorized such extension, and therefore strikes down section 58 entirely because of unconstitutionality, annulling the grant of the privilege to residents as a means of securing equality with nonresidents. Both the language of article IV, section 2, and its context, establish the unsoundness of this contention. Both

article IV, section 1, and subdivisions 1, 2 and 3 of section 2, operate directly upon the subject matter, *conferring* the rights therein given by the force of the federal constitution. The exercise of state legislative power is not necessary to the effectiveness of the grant of rights in these provisions of the federal constitution.

(c) *Construction Given Article IV, Section 2, by This Court.*

In *Ward* vs. *Maryland*, 12 Wall. (79 U. S.) 418, 430, 20 L. Ed. 449, 452, this court, through Mr. Justice Clifford, said:

> "Comprehensive as the power of the states is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the court, that the power can not be exercised to any extent in a manner forbidden by the constitution; and, inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the *defendant might lawfully sell, or offer or expose for sale*, within the district described in the indictment, *any goods which the permanent residents of the state might sell*, or offer or expose for sale in that district, *without being subjected to any higher tax or excise than that exacted by law of such permanent residents.*" (Italics ours.)

The result of the decision in this case was twofold: (1) it struck down a discriminatory burden imposed upon nonresidents; (2) it sustained by affirmative language the right of Ward, a nonresi-

dent, to sell goods in Maryland without hindrance, upon the same terms as those imposed upon permanent residents.

Squarely to the point, this court in the *Slaughter House Cases*, 16 Wall. (83 U. S.) 36, 77, 21 L. Ed. 394, 409, speaking through Mr. Justice Miller, said:

> "The constitutional provision there alluded to, did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause, no security for the citizens of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.
>
> "Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions upon their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Cole* vs. *Cunningham*, 133 U. S. 107, 113–4, 33 L. Ed. 538, 542, this court held:

> "The intention of section 2 of article IV was to *confer* upon the citizens of the several states a general citizenship, and to *communicate* all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to initiate actions." (Italics ours.)

(*d*) *The Purpose and Object of Article IV, Section 2.*

The purpose and object of article IV, section 2, also necessitates the construction given the provision by *Estate of Johnson, supra.* They are to secure equality of treatment to the citizens of the several states.

Such equality is best secured by the rule of *Estate of Johnson.* Under this rule the effect of article IV, section 2, is either—

(*a*) To communicate or confer the privilege upon the citizens of other states, where granted by a state to citizens alone; or

(*b*) To strike down a burden imposed by a state upon citizens of other states, where no corresponding burden is imposed upon its own citizens;

Article IV, section 2, does not and can not

(*c*) Strike down a benefit conferred by a state upon its own citizens because the state omitted to extend such benefit to noncitizens.

The effect of this construction is to accomplish, in the most direct manner, the objects which the "privileges and immunities" clause of article IV, section 2, was adopted to accomplish. Whenever a state gives privileges and immunities to its own citizens and wrongfully withholds them from noncitizens, the constitutional provision secures such privileges automatically and expeditiously to noncitizens. The roundabout method of nullifying state legislation as a penalty for failure to give equality

to noncitizens, necessitating new state legislative action to secure the purpose originally intended, if it can thus be secured, is resorted to only where equality can not be secured directly.

ANSWER TO BRIEF OF PLAINTIFF-IN-ERROR UPON THIS POINT.

1. WHERE AFFIRMATIVE STATE LEGISLATIVE ACTION IS AND IS NOT REQUIRED.

Mention has been made before of the rule that where a state grants privileges to its own citizens, the federal constitution in proper cases automatically extends such privileges to noncitizens. This rule was attacked below by plaintiffs-in-error and is here attacked upon the ground that the California Workmen's Compensation Act indicates no legislative authority for the extension of its benefits to nonresidents injured extraterritorially. It is claimed that the obligation of a workmen's compensation act can only be imposed upon employers by the state legislature, and where the legislature has not extended the provisions of said act to cover nonresidents, the federal constitution can not be interpreted to give such extension. It can only nullify the state legislation.

This contention is fully answered by the California Supreme Court in *Estate of Johnson* (*supra*) and in the opinion in the present case (Exhibits "C" and "D" in the Appendix to this brief), to which the court is referred.

Supplementing what is there said, plaintiffs-in-error have failed to grasp the distinction, as affecting the rights of noncitizens or nonresidents, between

the action of a state in conferring benefits upon its residents alone, and its action in imposing discriminatory taxes or burdens against nonresidents alone.

Where a burden is imposed upon a nonresident alone, equality of treatment can be secured by article IV, section 2, in one of two ways:

(*a*) by striking down the burden; or

(*b*) by imposing a corresponding burden upon residents.

The second the constitutional provision can not do, for want of authorization from the state legislative body, hence the former is the only method of securing equality.

Where, however, a state confers special privileges upon its own citizens alone, such privileges can be extended to nonresidents by the force of the federal constitution for the reasons stated in *Estate of Johnson, supra,* 139 Cal. 532, 73 Pac. 424. The federal constitution is the supreme law of the land, and can and does give to residents of other states sojourning in a state certain privileges given residents of the latter state by their own statutes, and this result more directly fulfills the purpose and object of the constitutional provision.

This distinction may be stated in another form by reference to the fundamental principle hereafter alluded to, that article IV, section 2, does not profess to control the power of the state over its own citizens and residents. It affects the relation of the state to noncitizens only.

It is perfectly true that article IV, section 2, can not be interpreted so as to grant privileges or impose duties upon *residents of the state enacting the legislation.* Only the state legislature can do this. And where there is no authority from the state legislature for such action, the privilege or burden can not be given residents by construction of the federal constitution. For instance, neither the United States Constitution nor the federal Congress can dictate to the State of California as to what classes of (resident) employees shall be included within the California Workmen's Compensation Act. Nor can the federal government compel the state government to impose taxes or burdens upon its own residents. These are matters of state action reserved exclusively to the states. Article IV, section 2, does not control such power of the state. To this extent, plaintiffs-in-error's contention is correct, and this was recognized in *Estate of Johnson, supra,* and in the present case.

Where, however, the State of California affirmatively gives privileges or immunities to its own residents, the federal constitution provides in certain cases that such privileges shall also extend to non-residents. The constitution of the United States is the supreme law of the land and a part of the law of every state. The people of the United States have by their supreme law willed that citizens of each state shall enjoy the same privileges in a state as its own citizens and residents. Action of the

state legislature, beyond that defining the rights of residents, is not required to complete the extension of such rights to citizens of other states. A higher law than the state statute confers the privilege.

The case at bar being one of a privilege conferred by the State of California upon its own residents, and not one of a discriminatory tax, license fee or other burden imposed upon nonresidents alone, it follows that section 58, if it contravenes article IV, section 2, is extended by a higher law to include nonresidents within its benefits, and hence is valid as to both classes of employees.

The rule that article IV, section 2, of the United States constitution, where it applies, extends *ex proprio vigore* to noncitizens the privileges and immunities given by a state to its own citizens, is further established by the following consideration. At the expense of repetition, we say:

Article IV, section 2, does not limit or control the power of a state over its own citizens. Therefore its applicability must be limited to such portions of a questioned state statute as affect noncitizens or nonresidents. It can only confer privileges or strike down discriminatory burdens, as the case may be, as to noncitizens or nonresidents. It can not strike down a grant by a state of a privilege or immunity to its own citizens, as such is purely a state matter.

Slaughter House Cases, 16 Wall. (83 U. S.), 77, 21 L. Ed. 394;

Bradwell vs. *Illinois,* 16 Wall. 130, 138;

United States vs. *Harris*, 106 U. S. 629, 643, 27 L. Ed. 290;
United States vs. *Wheeler*, 41 S. Ct. 133;
Estate of Johnson, 139 Cal. 532, 73 Pac. 424;
State vs. *Swanson*, 182 Ind. 582, 107 N. E. 275;
Commonwealth vs. *Griffin* (Ky.), 3 B. Mon. 208;
Wierse vs. *Thomas* (N. C.), 59 S. E. 58.

Since article IV, section 2, can not be applied to limit the power of a state in dealing with its own residents, it follows inevitably that it can not be applied in the present case to strike down the grant of privileges conferred by section 58 of the California act upon residents of California. It can only be applied to affect the rights of nonresidents. In so doing it may either, as stated above,

(*a*) Extend a privilege to nonresidents; or

(*b*) Annul a discriminatory burden imposed upon nonresidents.

By doing either of these things it fully secures the equality of treatment which it is its purpose to obtain. It can not

(*c*) Annul the grant of a privilege or immunity to a resident, because it does not control the power of a state over its own residents; or

(*b*) Impose a tax or other burden upon its own residents, in the absence of authority so to do from the legislature of the state, in order to equalize a corresponding tax or burden imposed on nonresidents only, and otherwise illegally discriminatory. Burdens can be imposed upon citizens only by the legislatures of their own states.

Since the workmen's compensation claimant in the present case under section 58 of the California Workmen's Compensation Act (defendant-in-error Owe Ming) is and was at the time of his injury a resident of California, it follows that the award and judgment in his favor below should be affirmed, the question of the rights of nonresidents being a question with which he is not concerned.

2. CONCERNING THE RIGHT TO A "COMMON-LAW REMEDY" AND TO HAVE RECOURSE TO THE FEDERAL COURTS UNDER DIVERSITY OF CITIZENSHIP.

Plaintiff-in-error's second ground of attack upon *Estate of Johnson, supra*, contains a roundabout process of reasoning which culminates in the claim that since some nonresidents are supposed to be denied recourse to the federal courts under diversity of citizenship by the extension of section 58 to them and by the exclusiveness of the rights and remedies given by the state compensation act, the section is therefore void by reason of the imposition of a discriminatory burden upon them by treating them exactly the same as residents.

In answer, we would first call attention to the fact that plaintiff-in-error, an employer, is not interested in whether or not a nonresident employee, a citizen of another state, can maintain a proceeding in the United States courts under diversity of citizenship. That question can be taken up when it arises properly.

We next call the attention of the court to the general situation here presented. Plaintiff-in-error first claims that section 58 is discriminatory because it fails to include nonresidents within its benefits.

Plaintiff-in-error now claims that it discriminates against nonresidents if it does include them within its benefits, by depriving them of a right to sue in the federal courts. And yet it is agreed that the states can give extraterritorial effect to their workmen's compensation acts. We are unable to see the consistency of this position.

Taking up the contention in more detail, we concede that both the right and the remedy provided by the California Workmen's Compensation Act are exclusive as to residents of California coming within its terms. The act deprives resident employees of: (*a*) What is usually termed the "common-law remedy," meaning thereby the right given injured employees against their employers by the general law, statutory or nonstatutory, in the absence of a workmen's compensation act; and (*b*) Recourse to the courts of the state to enforce the state act, the remedy provided by it being before an administrative board exclusively (Industrial Accident Commission).

Applying the California act, by the operation of section 58, to nonresidents injured outside the state, it is not true that such nonresidents are deprived of a "common-law remedy" under the law of California.

A nonresident of California injured outside the state does not under any circumstances have a right to sue for tort under the California law. The general law of California, statutory and nonstatutory, dealing with tortious injuries, has no extraterritorial application. A tort is invariably governed by the law of the state in which the injury occurs, 12 Corpus Juris 452; 26 Cyc. 1079. The provisions of the California statutes allowing damages to an employee for tortious injury are contained in sections 1969 and 1971 of the California Civil Code, which do not pur-

port to operate beyond the state. The presumption that such statutes are not intended to have extraterritorial effect governs. *North Alaska Salmon Co.* vs. *Pillsbury et al.*, 174 Cal. 1.

Neither does section 58 deprive a nonresident of California injured outside the state from bringing suit under the laws of the state of injury. If such person has a "common-law remedy" under the *lex loci delicti*, section 58 does not prevent its enforcement. California can not enact a law depriving a nonresident of California, injured in Oregon, of any right conferred upon him by the law of Oregon. Such action would be an invasion of the sovereignty of Oregon and wholly void. Moreover, nothing in the California Workmen's Compensation Act purports or attempts to nullify rights created under the laws of another state. The only effect section 58 can have, is to give the injured employee an election of remedies, *i. e.*, a choice between the laws of the two states involved. The injured employee has the right to the protection of the law of each state, but can not claim a double recovery for the same injury. As to injuries occurring outside the state, section 58 must therefore be interpreted to make the compensation right and remedy exclusive *only against all other rights and remedies given by the law of California.* Beyond that it can not, and does not, attempt or purport to go.

The claim that section 58, construed to include nonresidents, would deprive them of a right of action in the United States courts under diversity of citizenship, presents several aspects. A suit in the United States court is necessarily predicated upon a cause of action, *i. e.*, a violation of a right conferred by the law of some jurisdiction. As we have pointed out, a person injured outside of California is in no event

entitled to claim the benefit of the law of California, other than its compensation act. Any right given by the law of the place where the injury occurs, can, if the action is transitory, be enforced in any state court where the parties may be found, and in the federal courts, under diversity of citizenship. Nothing in the California Workmen's Compensation Act can be construed as a prohibition upon the jurisdiction of the federal courts under diversity of citizenship to hear and determine transitory causes of action arising under the laws of other states. If such attempt were to be made by the California act, which it does not, it would be utterly void and nugatory, as no state can abridge the jurisdiction of the United States courts.

This leaves only the question of whether a nonresident injured outside or inside of California is debarred from the right to bring suit in the Federal courts upon the California Workmen's Compensation Act upon the ground of diversity of citizenship. This ground is correlative to that of whether a person sued before the California commission under the California Workmen's Compensation Act can remove the suit to the federal courts upon diversity of citizenship. This question has never yet come up for decision. The California act contains no prohibition of suits being had under it in the federal courts, and in all probability, if such attempt were made in the California law, it would be invalid and merely dropped from the act. Furthermore, as a matter of construction, if two constructions are possible, one that the legislature attempted to act outside its jurisdiction and to curtail the jurisdiction of the federal courts, and the other that the legislature did not so intend, but intended merely to make the compensation rem-

edy exclusive as against other remedies provided *by the law of the state only*, the latter construction should be adopted. Where one of two possible constructions would expose a statute to constitutional defects, and the other would save it, the construction should be taken which would save the statute.

Furthermore, a state can not prevent a nonresident plaintiff from suing in the United States courts upon diversity of citizenship, if such right would exist except for such state prohibition.

Cowels vs. *Mercer*, 7 Wall. 118, 122;
Lincoln vs. *Luning*, 133 U. S. 529;
Chicot Co. vs. *Sherwood*, 148 U. S. 529.

If there be an attempted deprivation of such right to sue in the United States courts, the attempt is void. Moreover, it is only the attempt to deprive which is void, and the right to sue in the United States courts upon the right of action can still be exercised.

Applying the foregoing principles to plaintiff-in-error's conclusions, it follows that a nonresident injured abroad, is not the subject of any discriminatory burden imposed by the operation of section 58 of the California Workmen's Compensation Act, if it be extended to include such nonresidents. He is, instead, the beneficiary of the extension of the protection of the California Workmen's Compensation Act to him, which amounts to a substantial advantage. He is not deprived by such extension of benefit of any "common-law rights" which he could otherwise claim in California. He is not prevented from suing in any court, state or federal, upon any rights which he may acquire under the laws of the state in which his injury occurs. If he be entitled to sue under the California act in the United States

courts, except for some implied prohibition contained in such act, we claim that such implied prohibition does not exist, and if it did, it would not be valid to prevent such suit in the federal courts.

At the worst, section 58 merely extends to nonresidents injured outside of California, the benefits of the California Workmen's Compensation Act upon the same terms and conditions, and subject to the same limitations, as are contained in said act with reference to residents of the state. Nonresidents are placed upon a position of exact equality with residents. This cannot amount to a discriminatory burden against nonresidents within the doctrine of *Estate of Johnson, supra.*

It also follows that section 58, as extended to nonresidents, does not involve a violation of article IV, section 2 of the United States Constitution, as it does not, in any aspect of the case, place nonresidents at a disadvantage as compared to residents under the provisions of the Workmen's Compensation Act. It is not a violation of article IV, section 2, to treat residents and nonresidents upon terms of equality. This constitutional provision does not permit a citizen going into another state to claim any greater privileges than are given residents in that state.

Detroit vs. *Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260, 262.

The point here under discussion was not raised in the court below, and is here presented for the first time. The constitutional issues raised in the court below, and the assignment of errors made herein, limit the attack upon section 58 to the grounds of alleged repugnance to article IV, section 2, and to the "equal protection of the laws" clause of the Four-

teenth amendment. Hence the question of possible interference with the right to sue in the federal courts can be considered only as it bears upon either of the constitutional provisions assigned, and cannot now be urged for the first time as an independent ground of attack under some other constitutional provision.

We have pointed out, however, in this connection, that the California Workmen's Compensation Act does not attempt or purport to prevent suit in the United States courts upon diversity of citizenship. It purports only to give an exclusive remedy, exclusive as to all other rights or remedies existing under the state law, only. Beyond that, the state legislature presumably cannot act, and has not attempted to act. If it had attempted to limit the jurisdiction of the United States courts, such limitation would be nugatory, and fall to the ground, leaving nonresidents entitled to recourse in any event to the federal courts, at their pleasure.

III.

SECTION 56 OF THE CALIFORNIA WORKMEN'S COMPENSATION ACT DOES NOT CONTRAVENE ARTICLE IV, SECTION 2, OF THE CONSTITUTION OF THE UNITED STATES.

If the court has not already disposed of this case on either of the two preceding grounds, we are brought to the consideration of the merits of the contention of unconstitutionality. Upon the merits we assert and believe that there is no conflict between the statutory provision in question and the federal constitution, for the following reasons:

1. Article IV, section 2, does not apply to privileges which the state cannot constitutionally grant to nonresidents or noncitizens. The legislative power of California does not constitutionally extend to the protection of nonresidents injured outside the state.

2. Article IV, section 2, applies only to privileges which are to be enjoyed by citizens of other states within the state creating such privileges. It does not apply to a privilege to be enjoyed solely outside the state of its creation, such as the privilege of extraterritorial effect of its statutes.

3. Article IV, section 2, does not prevent the states from making reasonable classifications. The differentiation between residents and nonresidents contained in the provision under attack, is a reasonable classification.

Considering the foregoing points *seriatim*:

A. ARTICLE IV, SECTION 2, DOES NOT APPLY TO PRIVILEGES WHICH THE STATE CAN NOT CONSTITUTIONALLY GRANT TO NONRESIDENTS. THE LEGISLATIVE POWER OF CALIFORNIA DOES NOT CONSTITUTIONALLY EXTEND TO THE PROTECTION OF NONRESIDENTS INJURED OUTSIDE THE STATE.

If the State of California cannot validly protect by its workmen's compensation act residents of other states injured in Alaska, then article IV, section 2, of the federal constitution does not invalidate the section under attack for failure to attempt to give such protection.

(*a*) It has been held that a discrimination against a certain class does not render the statute unconstitutional where the legislature could not validly extend the privileges of the statute to such class. The constitution does not obligate a state to do what it cannot constitutionally do, or penalize it for failure to do so.

Brown-Forman Co. vs. *Kentucky*, 217 U. S. 563, 54 L. Ed. 883;

Dolley vs. *Abilene* (C. C. A. 8th Cir.), 179 Fed. 461;

Commonwealth vs. *Milton*, 51 Ky. R., 12 B. Mon. 212, 54 A. D. 522.

It stands to reason that if the state cannot in any event give to citizens of other states the privilege contended for, a citizen of another state cannot claim that he is deprived of any right guaranteed him by article IV, section 2.

(*b*) A state is limited, in giving extraterritorial force to its statutes, to the protection of its own citizens and residents abroad. It cannot, by the positive force of its own statute, affect transactions occurring outside its boundaries, between persons not its citizens or residents.

The Apollon, 9 Wheat. (22 U. S.) 361, 6 L. Ed. 111;

Rose vs. *Himely*, 4 Cranch (8 U. S.) 240, 279, 2 L. Ed. 608;

North Alaska Salmon Co. vs. *Pillsbury et al.*, 174 Cal. 1, 162 Pac. 93;

Whitford vs. *The Panama R. R. Co.*, 23 N. Y. 465, 470;
People vs. *Tyler*, 7 Mich. 160;
Commonwealth vs. *Gaines*, 2 Va. Cases 172.

See also:

1 Bishop Criminal Law, Sec. 121;
Wharton Criminal Law, 11th ed., sections 316, 322;
Wharton Digest International Law, 2d ed., Sec. 9.

See also an article written by Mr. Justice Brewer in 22 Cyc. 1718, 1732.

The status of the United States Consular Court at Shanghai, China, is discussed in *In re Ross*, 140 U. S. 453, 35 L. Ed. 581.

The same rule is recognized in England.

Rex vs. *Sawyer*, 2 C. & K. 101;
King vs. *Depardo*, 1 Taunt. 26;
Rex vs. *Helsham*, 4 C. & P. 394;
Rex vs. *Mattos*, 7 C. & P. 458;
Regina vs. *Serva*, 2 C. & K. 53.

We quote from a decision of this court describing the English rule as follows:

"We are not unmindful that the English Courts of Admiralty have ruled that a foreigner cannot set up against a British vessel, with which his ship has collided, that the British vessel violated the British Mercantile Marine Act, on the high seas, for the reason, as given, that the foreigner was not bound by it, inasmuch as it is beyond the power of Parliament to make rules

applicable to foreign vessels outside of British waters. This decision was made in 1856, in the case of *The Zollverein,* 1 Swab. 96. A similar rule was asserted also in *The Dumfries,* (1 Swab. 63) decided the same year; in *The Saxonia* (1 Lush. 410) decided in the High Court of Admiralty in 1858 and by the Privy Council in 1862. The same doctrine was laid down in 1858, in the case of *Cope* vs. *Doherty* (4 Kay and J. 367; 2 De Gex and Jones 626), and in The Chancellor (4 Law Times M. S. 627), decided in 1861."

The Scotia, 14 Wall. (81 U. S.) 170, 20 L. Ed. 822, 825.

The rule that the statutes of a state are not enforceable beyond its boundaries, except as to its own citizens or residents, is more than a rule of comity sanctioned by international law. If it were only a rule of comity, state statutes would not be held void for exceeding it. The only result would be that other states would decline to recognize rights created under them, leaving such statutes in force in the state of their enactment. But in the following cases state statutes have been held *unconstitutional* in the state of their enactment because the state endeavored to give extraterritorial effect to them beyond the limitation here discussed:

Brown-Forman Co. vs. *Ky.,* 217 U. S. 563, 54 L. Ed. 883;

Riverside Mills vs. *Menefee,* 237 U. S. 189, 59 L. Ed. 910;

N. Y. Life Ins. Co. vs. *Head,* 234 U. S. 149, 58 L. Ed. 1259;
State Tax on Foreign Held Bonds, 15 Wall. (82 U. S.) 300, 21 L. Ed. 179;
State vs. *Clark* (Mo.), 76 S. W. 1007;
The Scotia, 81 U. S. 170;
Worthington vs. *District Court* (Nev.) 142 Pac. 230;
State vs. *Ray* (N. C.), 66 S. E. 204;
Union Nat. Bank vs. *Chicago,* Fed. Cas. 14374;
State vs. *Knight,* 1799, 1 N. C. 44;
State vs. *Carter,* 27 N. J. L. 499;
People vs. *Price,* 250 Ill. 109, 95 N. E. 68;
State vs. *L. & N. Ry. Co.* 177 Ind. 553, 96 N. E. 340;
Adams vs. *Dick,* 170 N. Y. S. 17;
De Brimont vs. *Penniman,* 10 Blatch. 436.

The rule is therefore a positive limitation upon state legislative power.

(*c*) The underlying theory which justifies extra-territorial effect of statutes has not been clearly stated by the courts. We conceive that such power in a state rests upon one or more of the following legal principles:

1. As a power inherent in sovereignty. A state may protect its own citizens or residents while abroad, but its extraterritorial force is limited to the protection of, or imposition of duties upon, its own citizens or subjects.

The authorities cited above establish both the power and the limitation.

2. As a power inherent in the police power of the state. A state may protect its citizens and its common weal against the unfortunate consequences of industrial injuries. (*N. Y. Cent. R. R. Co.* vs. *White*, 243 U. S. 188, 61 L. Ed. 667). The harm to the state and its citizens and residents is approximately the same where the injury occurs outside the state as inside, so long as the injured employee or his dependents reside within the state during their period of adversity following the injury.

If the power of a state to give extraterritorial force to its workmen's compensation act is based upon its police power to protect its own citizens and welfare, then such power is also limited by the police power and cannot be extended beyond it, to cases where its citizens and welfare are in no way affected. The protection of citizens of New York against injuries sustained by them while employed in Alaska, cannot be referred to the police power of California. The injured New Yorker will in all probability return to his own state after the injury, or will leave widow or orphans in his own state. Certainly there is no presumption that residents of New York or any other state, injured in Alaska, will affect the interests of California. The police power, therefore, would not justify the extension of section 58 of the California law, to the protection of nonresidents injured abroad. See

In re Fowles 89 Kan. 430, 131 Pac. 598;
Hanks vs. *State*, 13 Tex. Ct. App. R. 289.

3. Extraterritorial power may also be based upon legislative jurisdiction over a status.

> "All taxes, therefore, must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of persons nor property, the imposition of a tax would be *ultra vires* and void. *Jurisdiction is as necessary to valid legislation as to valid judicial action.*" (Italics ours.)
>
> *Union National Bank* vs. *Chicago,* Fed. Cas. 14374.

To the same effect see *Brown-Forman Co.* vs. *Ky.,* 217 U. S. 563, 54 L. Ed. 883.

The obligation imposed by the California workmen's compensation act is a statutory addition to the duties imposed by law upon the status or relationship of master and servant and not an obligation sounding in contract. It has been so construed by the California Supreme Court in *North Alaska Salmon Co.* vs. *Pillsbury et al.,* 174 Cal. 1, 162 Pac. 93.

Since the obligation of the California act has been determined by the Supreme Court of California to rest upon a positive statute imposing additional incidents upon the relationship of master and servant, by the force of the statute and not by the implied contract or consent of the parties, it follows that such relationship must itself have a *situs* within the State of California, or section 58 cannot validly determine its incidents. Such *situs* is necessarily determined

by domicile or residence, as with all other relationships. Jurisdiction over marriage for purpose of divorce, over guardian and ward, parent and child, and necessarily also over master and servant, is based upon domicile or residence. Hence where a *non-resident of* California is injured while working in Alaska, the legislature of California has no power to determine the rights and duties between such employee and his employer, as the *situs* of the status is not within its jurisdiction.

The California Supreme Court seems to have been led away from this conclusion because of the fact that under section 58 of the California law the contract of hire must have been made in California, as well as the employee be resident therein, to enable the California act to apply extraterritorially. It is sufficient to say that jurisdiction over the status of master and servant is conferred by the *residence of the parties at the time of the injury,* not by the fact that the status was originally created in California. The place of the original creation of the status has nothing to do with it, unless the obligation sought to be imposed sounds in contract, which it does not in California.

North Alaska Salmon Co. vs. *Pillsbury et al.,* 174 Cal. 1, *supra.*

In the following workmen's compensation cases it is held that the law of the state in which the business is carried on or the parties are resident, applies, and not the law of the state where the contract of hire was originally made.

Smith vs. *Heine Safety Boiler Co.*, 224 N. Y. 9;
Gardiner vs. *Horseheads Construction Co.*, 156 N. Y. S. 899;
Perlis vs. *Lederer*, 178 N. Y. S. 449;
Barnhart vs. *American Concrete Steel Co.* (N. Y.), 125 N. E. 675.

Coupling the decision of the California Supreme Court, that the obligation of the California Workmen's Compensation Act is an affirmative statutory duty and does not sound in contract, with the decisions from New York, cited above, (the New York Workmen's Compensation Act being a compulsory measure on all fours with that of California) it follows that the place of the original making of the contract of employment is without legal significance. The duty to compensate is affixed to the status at the moment of the injury and the status must therefore at such moment be within the jurisdiction of the state whose law is sought to be applied.

The result is that upon all possible theories sustaining the power to give extraterritorial force to a state workmen's compensation act, such power is limited to the protection of residents abroad of the state whose law is sought to be applied.

Such being the case, the State of California could not give the benefits of section 58 to nonresidents, and as article IV, section 2, of the federal constitution does not change this result, it necessarily does not invalidate section 58 for failure to do the impossible.

B. ARTICLE IV, SECTION 2, APPLIES ONLY TO PRIVILEGES WHICH ARE TO BE ENJOYED WITHIN THE STATE CREATING SUCH PRIVILEGES.

This has been held in the following cases:

Blake vs. *McClung*, 172 U. S. 239, 256, 43 L. Ed. 432, 439;

Conner vs. *Elliott*, 18 How. (U. S.) 591;

McCarter vs. *Hudson County Water Co.*, 70 N. J. Eq. 696, 65 A. 489 at 493.

In *Blake* vs. *McClung*, 172 U. S. 239, *supra*, this court said:

> "The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage *when he is within or when he removes to another state, or when asserting in another state* the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established." (Italics ours).

In *Conner* vs. *Elliott*, 18 How. (59 U. S.) 591, 15 L. Ed. 497, this court held:

> "Such discrimination has no connection with the clause in the constitution now in question (Art. IV, Sec. 2). If a law of Louisiana were to give to the partners *inter sese* certain peculiar rights, *provided they should reside within the state, and carry on the partnership trade there*, we think it could not be maintained that all copartners, citizens of the United States, residing

and doing business elsewhere, must have those peculiar rights by force of the constitution of the United States, any more than it could be maintained that, because the law of Louisiana gives certain damages on protested bills of exchange, drawn or indorsed within that state, the same damages must be recoverable on bills drawn elsewhere in favor of citizens of the United States."

In *McCarter* vs. *Hudson County Water Company*, 70 N. J. Eq. 696, 65 A. 489, 492, *supra*, it was held by the New Jersey Court:

"Certainly it is not within the intendment of the constitutional clause" (referring to article IV, section 2) "that citizens of New York, while resident there, shall have all the privileges that they would enjoy if residents within our borders."

C. ARTICLE IV, SECTION 2, DOES NOT PREVENT THE STATES FROM MAKING REASONABLE CLASSIFICATIONS. THE DIFFERENTIATION BETWEEN RESIDENTS AND NON-RESIDENTS CONTAINED IN THE PROVISION UNDER ATTACK, IS A REASONABLE CLASSIFICATION.

Article IV, section 2, does not prevent reasonable classification based upon residence.

Blake vs. *McClung*, 172 U. S. 239, 43 L. Ed. 432;
Travelers Insurance Co. vs. *Connecticut*, 185 U. S. 364, 46 L. Ed. 949;
Travis vs. *Yale & Towne Mfg. Co.*, 40 S. Ct. R. 228;
LaTourette vs. *McMaster*, 248 U. S. 465;
Shaffer vs. *Carter*, 40 S. Ct. R. 221;
McCready vs. *Virginia*, 94 U. S. 391, 24 L. Ed. 248.

Section 58 of the California Workmen's Compensation Act is based upon a reasonable classification, established by one or more of the following considerations:

1. The State of California having no jurisdiction to protect nonresidents of California injured outside of California, is clearly reasonable in refraining from the enactment of an unconstitutional statute attempting to provide such regulation.

2. The State of California has no interest in protecting residents of New York who are injured in Alaska. New York can protect its own citizens and residents injured abroad, and Alaska can also give the same protection. Injuries to nonresident employees abroad do not affect the property or interests of California or her citizens.

3. If each state were to attempt to protect all the residents of all other states injured outside of the state conferring the protection, the conflict of laws and jurisdiction would become intolerable. The exercise of extraterritorial jurisdiction must be restricted by each state to prevent unnecessary conflicts of laws.

In re Fowles, 89 Kan. 430, 131 Pac. 598.

4. The object of the California Workmen's Compensation Act is to compel California industry to bear its fair share of the burden thrown upon the State of California by the killing and wounding of workmen in industry. (*Western Indemnity Co.* vs. *Pillsbury et al.*, 170 Cal. 686, 151 Pac. 398.) To fully attain this object it is necessary that California industry remain subject to the same burden where

California employees in the course of its operation are injured while temporarily outside the state. It is no part of this object that California should protect Nevada or its citizens against the killed and injured of Nevada industry outside the state becoming a burden upon Nevada. It would, in fact, be an invasion of the soverignty of Nevada and outside the police power of California for California to officiously intermeddle in the public affairs of Nevada in this manner.

In the last analysis, the reasonableness of section 58 turns upon the difference between intraterritorial and extraterritorial legislation. The resident of any state of the United States *injured in California* is entitled to the benefits of the California compensation act upon the same terms as residents of California, under article IV, section 2, of the Federal Constitution. But for injuries occurring outside of California the California Workmen's Compensation Act should apply only to the protection of California residents or to the advancement of California welfare, and not further. As to injuries occurring in the Territory of Alaska, every state can protect its own residents working in Alaska, and Alaska may also legislate upon the subject. It is not necessary or reasonable for Oregon to legislate concerning the employment of Californians in Alaska, or for California to legislate concerning the employment of Oregonians in Alaska.

IV.

THE PROVISIONS OF SECTION 58 DO NOT VIOLATE THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT.

The provisions of the United States constitution here invoked by plaintiff-in-error is as follows:

> "* * * no state shall make or enforce any law which shall abridge * * *, nor deny to any *person within its jurisdiction*, the equal protection of the laws." (Italics ours.)

Obviously this provision has no application to section 58 of the California Workmen's Compensation Act.

A. THE EQUAL PROTECTION OF THE LAWS IS GUARANTEED BY THE FOURTEENTH AMENDMENT ONLY TO PERSONS "WITHIN ITS JURISDICTION," I.E., WITHIN THE JURISDICTION OF THE STATE IN QUESTION.

This is so clear from the language of the Fourteenth Amendment that citation of authorities is unnecessary. See, however:

National Mercantile Co. vs. *Matson*, 45 Utah 159, 143 Pac. 223.

A resident of New York injured in Alaska is not at the moment of his injury in Alaska within the jurisdiction of the State of California. California is not required to give equality of treatment under its laws to him. It is only required to give equal protection of the laws where the injury occurs within the State of California. The constitutional

provision refers only to intraterritorial effect of statutes, not to their extraterritorial effect. The reason is obvious. Extraterritorial jurisdiction of a state, as a matter of constitutional and international law, is not exercised except for the protection of citizens or residents, or to protect the state itself from harm.

An attempt was made below to evade this conclusion by stating that the right to sue under the California Workmen's Compensation Act could be exercised in California by a nonresident by his going to that state to institute proceedings before the California Industrial Accident Commission. From this premise, the conclusion was reached that a nonresident in California could not be debarred from the right to institute proceedings within the state upon equal terms with residents. This contention overlooks the distinction between *rights* and *remedies*. A suit can not be brought unless there be a cause of action, *i. e.*, a breach of a legal right, prior to the institution of the suit. In the situation under discussion the *right* exists while the employee is working in Alaska, and the breach of that right occurs *at the moment of his injury in Alaska*. At the time the right accrues the person is not within the jurisdiction of the State of California. If a citizen of New York injured in Alaska does not acquire, while in Alaska, a right to benefits under the California Workmen's Compensation Act, there is nothing left upon which he can bring suit in California. Hence his exclusion from the California Workmen's

Compensation tribunal is not due to any denial to him of the equal protection of the laws while in California, but to the fact that a cause of action in his favor under the California Compensation Act did not arise upon his injury abroad.

Again, the language of the Fourteenth Amendment refers to jurisdiction of the person. The clause reads:

> "* * * deprive *any person* within its jurisdiction of the equal protection of the laws."

This clearly means that the *person* must be within the state at the time his cause of action arises, to claim the benefits of this portion of the Fourteenth Amendment.

B. THE CONTENTIONS MADE IN THE PRECEDING PORTION OF THIS BRIEF WITH RESPECT TO THE "PRIVILEGES AND IMMUNITIES" CLAUSE OF THE CONSTITUTION (ARTICLE IV, SECTION 2) APPLY, IN THE MAIN, WITH EQUAL FORCE TO THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT.

To avoid unnecessary repetition we will merely summarize those points at this time, showing their applicability to the Fourteenth Amendment. They are:

1. An employer, not being a member of the class discriminated against, can not raise the constitutional point.

The contentions heretofore made under this heading on pp. 14 to 23 of our brief with respect to the privileges and immunities clause, apply with

equal force here. The rule that a person whose constitutional rights are not invaded by an alleged discrimination can not raise the point, applies to all constitutional questions involving discriminaton.

2. If section 58 of the California Workmen's Compensation Act violates article IV, section 2, of the federal constitution, the effect of such violation is to extend the privileges of section 58 to citizens and residents of other states.

If our contentions on this point are accepted by the court with reference to article IV, section 2, no further question can arise with respect to the "equal protection of the laws" clause of the Fourteenth Amendment. If nonresidents, by the force of article IV, section 2, enjoy the same privileges as residents under section 58, no discrimination remains upon which the Fourteenth Amendment can be invoked.

Our argument upon this contention is found on pp. 24 to 33 of this brief.

3. If section 58 of the California Workmen's Compensation Act does not violate the privileges and immunities clause, it necessarily does not violate the "equal protection of the laws" clause. This is for the reason that the purpose and effect of both constitutional provisions is the same, *i. e.*, to strike down unlawful discriminations against certain classes of persons. The only class alleged to be discriminated against in the present case is nonresidents of the State of California; hence, the question of discrimination is the same under either constitutional provision. See pp. 24 to 44 of this brief for the argu-

ment upon this question. We there contend:

(*a*) The "privileges and immunities" clause only applies to privileges and immunities which can be enjoyed within the state of their creation. Similarly, the "equal protection of the laws" clause applies only to protection which can be enjoyed *within the jurisdiction* of the state enacting such laws.

(*b*) The State of California having no power to protect residents of other states injured outside of California, does not act unreasonably in declining to give such protection.

Naturally, if a state merely recognizes and regards the limits of its own power, the mere fact that it finds certain classes of persons outside the limits of its power does not constitute an unreasonable and unconstitutional discrimination against such persons. This is as true of the Fourteenth Amendment as it is of article IV, section 2. (See pp. 44 to 54 preceding of this brief.)

(*c*) The "equal protection of the laws" clause does not prohibit reasonable classification under the police power of the state.

Jeffery Mfg. Co. vs. *Blagg* 235 U. S. 571, 576, 59 L. Ed. 364, 369;

Travelers Ins. Co. vs. *Connecticut,* 185 U. S. 364;

Brown-Forman Co. vs. *Kentucky,* 217 U. S. 563, 54 L. Ed. 883;

Magoun vs. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.

The following is quoted from *Magoun* vs. *Illinois Trust & Savings Bank, supra,* speaking of the Fourteenth Amendment:

> "*It does not prohibit legislation which is limited either* in the objects to which it is directed, *or by the territory within which it is to operate.* It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." (Italics ours.)

The classification contained under section 58 of the California act is reasonable.

This contention is covered by what we have said in this brief pp. 55 to 58 with respect to reasonableness of the classification under article IV, section 2 of the constitution.

SUMMARY.

We therefore contend that the judgment below should be affirmed by this court for the following reasons:

1. The plaintiff-in-error, as an employer, is not entitled to raise either of the constitutional objections presented.

2. If section 8 of the California Workmen's Compensation Act violates article IV, section 2, the effect of such violation is to extend the benefits of the California Workmen's Compensation Act to nonresident employees injured extraterritorially, and thus to validate the section as applied to residents of California,

as in the present case; with this construction of article IV, section 2 of the constitution, the question of discrimination is removed and the "equal protection of the laws" clause of the Fourteenth Amendment also becomes inapplicable.

3. Section 58 of the California act does not violate article IV, section 2, of the United States constitution:

(*a*) The legislative power of California does not extend to the protection of residents of other states injured in Alaska, and the failure of California to attempt an invalid extension of the benefits of its workmen's compensation act to nonresidents does not constitute a violation of article IV, section 2;

(*b*) Article IV, section 2, does not apply to privileges granted by a state to be enjoyed extraterritorially;

(*c*) Article IV, section 2, does not prohibit reasonable discrimination between residents and nonresidents, and the discrimination in the present case is reasonable.

4. Section 58 of the California act does not violate the "equal protection of the laws" clause of the Fourteenth Amendment:

(*a*) The "equal protection of the laws" clause applies only to privileges to be enjoyed within the state granting such privileges;

(*b*) The contentions made above with respect to

article IV, section 2, of the constitution are equally applicable to the clause of the Fourteenth Amendment herein invoked.

Respectfully submitted.

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EXHIBIT A.

OPINION OF THE SUPREME COURT OF CALIFORNIA IN ESTABROOK STEAMSHIP COMPANY AND KLAMATH STEAMSHIP COMPANY VS. INDUSTRIAL ACCIDENT COMMISSION, 177 CAL. 767, 177 PAC. 848.

A. F. ESTABROOK CO. VS. INDUSTRIAL ACCIDENT COMMISSION; KLAMATH S. S. CO. VS. INDUSTRIAL ACCIDENT COMMISSION.

SLOSS, J.: In *North Alaska Salmon Co.* vs. *Pillsbury*, 174 Cal. 1 (162 Pac. 93), we held that the Workmen's Compensation, Insurance and Safety Act, as originally enacted, did not authorize an award of compensation where injury to the employee had occurred beyond the boundaries of this state. The question decided was simply one of interpretation. It was assumed that the legislature had power to require employers to compensate "injured employees whose employment was created in this state, regardless of the place where the injury may have been sustained." The language of the statute, as read by the court, indicated, however, that the legislature had not intended to make the compensation scheme applicable to cases of injury arising outside the state.

In 1915 the scope of the act was extended by the addition of a new section (75*a*), reading as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state

at the time of the injury and the contract of hire was made in this state and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1915, p. 1101.)

We have before us, in each of the above-entitled proceedings, a writ of *certiorari* issued on behalf of the employer to test the validity of an award made pursuant to the terms of this section. The two proceedings are presented on a single set of briefs.

The petitioners do not question the existence of the general legislative power which, in our opinion in the North Alaska Salmon Company case, we assumed to exist. The sole ground of attack is that section 75*a* involves an unjustifiable discrimination against employees who are not residents of this state, and thus violates the provision of the constitution of the United States declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (Art. IV, Sec. 2), and that prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws" (Amdt. XIV, Sec. 1). Under settled principles of constitutional law, the petitioners are not in a position to raise this question. Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operation of the statute. (12 C. J. 760; *Scheerer & Co.* vs. *Deming*, 154 Cal. 138, 142, [97 Pac. 155].) More specifically, a contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons "may not be raised by one not belonging to the class alleged to be discriminated against." (12

C. J. 768; 10 Cent. Dig., col. 1284 *et seq.*; *Estate of Johnson*, 139 Cal. 532, 534, [96 Am. St. Rep. 161, 73 Pac. 424].) Thus, the validity of a statute excluding colored persons from serving on juries can not be questioned by whites. (*Commonwealth* vs. *Wright*, 79 Ky. 22, [42 Am. Rep. 203].) Nor may a male question the validity of a statute as discriminating against women. (*McKinney* vs. *State*, 3 Wyo. 719, [16 L. R. A. 710, 30 Pac. 293].) On like grounds, it has been held that a resident or citizen is not entitled to assail an act on the ground that it discriminates against those who are not residents or citizens. (*Bozeman* vs. *State*, 7 Ala. App. 151, [61 South. 604]; *Schmidt* vs. *Indianapolis*, 168 Ind. 631, [120 Am. St. Rep. 386, 14 L. R. A. (N. S.) 787, 80 N. E. 632]; *Gallup* vs. *Schmidt*, 154 Ind. 196, [56 N. E. 443]; *State* vs. *Kirby*, 34 S. D. 281, [148 N. W. 533].) Very directly in point is the decision of the Supreme Court of the United States in *Jeffrey Manufacturing Company* vs. *Blagg*, 235 U. S. 571, [59 L. Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570]. The validity of the workmen's compensation law of Ohio was there questioned. That law deprived a certain class of employers of five or more men of various defenses available to employers of less than five. The plaintiff-in-error, who was an employer of more than five, and within the class designated, assailed the legislation on the ground, among others, that the act discriminated unjustly against workmen in shops employing less than five men. The court held that this ground of attack was not available to the employer, saying (235 U. S. 576, [59 L. Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570]):

"Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employee in a shop with five employees, with those having less. No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, can not be decisive; for it is a well settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Ry. Co.* vs. *King*, 217 U. S. 524–534, [54 L. Ed. 868, 30 Sup. Ct. Rep. 594]; *Engel* vs. *O'Malley*, 219 U. S. 128, 135, [55 L. Ed. 128, 31 Sup. Ct. Rep. 190]; *Standard Stock Food Co.* vs. *Wright*, 225 U. S. 540, 550, [56 L. Ed. 1197, 32 Sup. Ct. Rep. 784]; *Yazoo & M. Valley R. R. Co.* vs. *Jackson Vinegar Co.*, 226 U. S. 217, 219, [57 L. Ed. 193, 33 Sup. Ct. Rep. 40]; *Rosenthal* vs. *N. Y.*, 226 U. S. 260, 271, [Ann. Cas. 1914 B, 71, 57 L. Ed. 212, 33 Sup. Ct. Rep. 27]; *Darnell* vs. *Indiana*, 226 U. S. 390, 398, [57 L. Ed. 267, 33 Sup. Ct. Rep. 120]; *Plymouth Coal Co.* vs. *Pennsylvania*, 232 U. S. 531, 544, [58 L. Ed. 713, 34 Sup. Ct. Rep. 359]; *Missouri, Kansas & T. Ry. Co.* vs. *Cade*, 233 U. S. 642, 648, [58 L. Ed. 1135, 34 Sup. Ct. Rep. 678]."

This reasoning is decisive of the present case. If section 75*a* contains—we do not say it does— an unwarranted discrimination against nonresidents, the only persons entitled to attack the law on this ground are members of the class thus excluded from the benefits of the legislation. No constitutional right of the employer is invaded by the action of the legislature in subjecting him to a less extensive liability than might have been imposed. Not being required to pass

upon the constitutional question sought to be raised, we would not be justified in entering into a discussion of its merits.

Each of the awards is affirmed.

RICHARDS, J. *pro tem.*, WILBUR, J., MELVIN, J., VICTOR E. SHAW, J. *pro tem.*, and ANGELLOTTI, C. J., *concurred.*

Rehearing denied.

EXHIBIT B.

DISSENTING OPINION OF MR. JUSTICE WILBUR IN THE FIRST DECISION BELOW IN THE CASE AT BAR, QUONG HAM WAH COMPANY VS. INDUSTRIAL ACCIDENT COMMISSION, 59 CAL. DEC. 18, NOT ELSEWHERE REPORTED BECAUSE MAJORITY OPINION WAS REVERSED UPON REHEARING.

QUONG HAM WAH COMPANY, PETITIONERS, VS. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL., RESPONDENTS.

DISSENTING OPINION.

I dissent.

In March, 1918, this court by unanimous decision in bank, decided the identical point raised here. (*Estabrook* vs. *Ind. Acc. Comm.*, *Klamath Steamship Co.* vs. *Ind. Acc. Comm.*, 177 Cal. 767.) It is now proposed to squarely overrule that decision on the theory that in rendering it certain exceptions to the general rule relied upon were overlooked, and that the federal case therein particularly relied upon (*Jeffrey* vs. *Blagg*, 235 U. S. 571) also overlooked these exceptions, and that a subsequent decision by the Supreme Court of the United States (*Buchanan* vs. *Warley*, 245 U. S. 60) was based upon and recognized one of these exceptions, and to that extent modified the previous decision of the Supreme Court of the United States relied upon in the case of *Estabrook* vs. *Ind. Acc. Comm.*, *supra*. The general rule recognized in *Estabrook* vs. *Industrial Acc. Comm.*, and in the cases therein relied upon as authority for that decision, is that where the statute is complained of as being unconstitutional by reason of discrimination against a certain class, that persons other than mem-

bers of that class can not complain of the unconstitutionality of the law, for the reason that they are not hurt by the discrimination, and not for the reason that the person raising the question is not interested in or affected by the statute claimed to be unconstitutional. Of course, if it be said that every unconstitutional law is void and that every person affected thereby is therefore affected by void legislation, then it would be true that any person whose conduct is regulated by the statute would be to that extent entitled to complain of such invalidity. But this course of reasoning the Supreme Court of the United States has refused to follow, for the reason that the fundamental purpose of the fourteenth amendment to the constitution of the United States was to protect against discrimination, and it was therefore held that only those discriminated against could raise the question. The substantial effect of this line of decisions is that a law, although unconstitutional as to one class by reason of discrimination against that class, can be enforced as to all others, and in all cases except where the rights of those discriminated against are involved. A similar rule applies generally to constitutional questions. As was said by the Supreme Court of the United States in *Hatch* vs. *Reardon,* 204 U. S. 152, 160: "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstand-

ing the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." It is said that one of the exceptions to the rule stated is: "Where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality." This certainly is a strange doctrine—that a law is valid as to all classes except the class discriminated against, unless that class is precluded from making complaint, in which event the law is invalid as to every class. Such an exception overlooks the purpose of the rule, namely, to confine the complaint against such legislation to those who are injured by it, in the sense that they are deprived of a constitutional right to equal treatment. No decision of the United States Supreme Court called to our attention recognizes such an exception to the general rule.

It is held that there is an exception to the rule where the rights of the party raising the question of the constitutionality of the law are directly affected by the law. On this point *Buchanan* vs. *Warley, supra*, is cited as an evidence of this exception to the rule, and it is upon this theory that the majority of the court places its decision that the employer can complain that certain classes of employees are discriminated against. It should be noted that if this is an exception to the rule, then the exception is as broad as the rule, and if any such exception is established it practically overrules all those decisions maintaining and enforcing the rule that only those discriminated against can raise the constitutional question, for the exception is in effect

that *any one* injuriously affected by a decision that the law is constitutional can claim it is unconstitutional, even though not in the class discriminated against. In other words, anyone can claim the statute to be void if such a conclusion is to his advantage. An examination of the case of *Buchanan* vs. *Warley* shows that the facts there involved are so different from those requiring the application of the rule under discussion, that the rule was neither mentioned nor discussed. There a white man had sold real estate to a colored man, and in the contract it was provided that the latter would not be required to complete the purchase unless he was by law authorized to use the land purchased for a residence. The right of the plaintiff, although a white man, turned them upon the constitutionality of the ordinance, which in effect prohibited him from selling the land to a colored man for residence purposes. This invaded his right to dispose of his property. Although the colored man was seeking to sustain the validity of the ordinance and the white man to attack it, the very point involved in the controversy was the validity of that ordinance, and a member of the class discriminated against was before the court. The fact that the latter took the position that the law was constitutional did not alter the fact that a member of the class discriminated against was before the court. In a recent decision by the United States Supreme Court (*Middleton* vs. *Texas Power and Light Co.*, 39 S. C. R. 227, 249 U. S. 152), an employee claimed that the Workmen's Compensation Law of Texas violated the fourteenth amendment for the reason that it excluded from its operation "domestic servants, farm laborers", etc. The employee who was not in the excepted classes brought an action for damages against the employer.

The employer set up the provision of the Workmen's Compensation Act, providing an exclusive remedy for employees. There were two possible arguments: one, that the excepted class was discriminated against by being omitted from the act, and the other that the included employees were discriminated against by being included therein and thereby deprived of the usual legal remedies retained by the excepted class. In disposing of the matter the court held that the plaintiff could not be heard to complain that the *omitted class* was discriminated *against* by such omission; but that his claim that he was *discriminated against* by inclusion therein could be considered. Instead of claiming the benefit of the law he was seeking to escape its limitations, and as such was a person in a class discriminated against. The court said: "Of course plaintiff-in-error, not being an employee in any of the excepted classes, *would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act,*" (citing as authority for the statement the line of cases relied upon in *Estabrook* vs. *Industrial Accident Commission, supra,* including *Jeffrey Mfg. Co.* vs. *Blagg, supra*). "But plaintiff-in-error sets up *a grievance* as a member of a class to *which the act is made to apply.*" (Italics ours.) Surely there is no suggestion here that the employer could set up the discrimination to escape liability under the act, for in no case was it discriminated against. The claim considered by the court was that of a denial of the equal protection of the law, and is thus stated: "This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges *which by the act*

are denied to employees of the non-excepted classes, without reasonable basis for the distinction." (Italics ours.)

In a still later case (*Arizona Copper Co.* vs. *Hammer,* 39 Sup. Court Reporter, 553, 249 U. S. * * *), in an action involving the constitutionality of the Arizona Employers Liability Act, the court again relied upon *Jeffrey* vs. *Blagg, supra,* and *Middleton* vs. *Texas Light and Power Co., supra,* as authority for the proposition there advanced, namely, "To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: First, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs-in-error have no standing to raise the question," citing the authorities above mentioned. The point involved was that the statute applied only to hazardous occupations. A decision of the Supreme Court of the United States, not cited by Mr. Justice Sloss in the opinion in *Estabrook* vs. *Industrial Accident Commission,* is *Erie Ry. Co.* vs. *Williams,* 233 U. S. 685. It was there held, quoting from the syllabus: "An employer can not be heard to attack a state statute relating to payment of wages, *on the ground that it denies to some of his employees the equal protection of the law* because they are not within its protection." In that case the employer had as direct an interest in establishing the unconstitutionality of the law as he has in the case at bar, and yet it was held that he could not raise the question.

WILBUR, J.

EXHIBIT C.

OPINION OF SUPREME COURT OF CALIFORNIA IN ESTATE OF JOHNSON, 139 CAL. 532, 73 PAC. 424, 96 A. L. R. 161.

IN THE MATTER OF JACOB C. JOHNSON, DECEASED.

HENSHAW, J.: There are two appeals, the one taken by resident nephews and nieces, the other by nonresident nephews and nieces, citizens of sister states. Both are from the order of the court holding their respective distributive portions of the estate of the deceased liable for the payment of the collateral inheritance tax under the law as it stood in 1897. (Stats. 1897, p. 77.) So much of section 1 of that act as is necessary to this consideration is as follows: "after the passage of this act, all property which shall pass by will * * * other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, *and nieces or nephews when a resident of this state* * * * shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, * * * for the use of the state; * * * provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." The original act of 1893 (Stats. 1893, p. 193) is identical with the section as amended in 1897, saving for the italicized words above quoted, which are added by the amendment.

In the *Estate of Mahoney*, 133 Cal. 180, this amendatory clause was held to be in violation of the provisions of section 2 of article IV of the constitution of the United States, as well as of section 1978 of the Revised Statutes of the United States. It was

concluded that the amendment was void and should be stricken from the act, leaving the inheritances of all nephews and nieces liable for the tax as they were under the original act of 1893. Upon this present appeal we are asked to give further consideration to the question, and have done so, with the result that we have reached the conclusion that an erroneous construction was given to the law in the Mahoney case, and that an erroneous principle of constitutional interpretation was there announced.

In the Mahoney case the appealing nephews and nieces were not citizens of any state of the United States, but were aliens, and therefore had no right to raise the constitutional question of immunities and prerogatives pertaining solely to citizens of sister states. One who does not belong to the class that might be injured by a statute can not raise the question of its invalidity. (*Brown* vs. *Ohio Valley Ry. Co.*, 79 Fed. 176; *Red River Valley etc. Co.* vs. *Craig*, 181 U. S. 548; *United States* vs. *Moriarity*, 106 Fed. 886.) A court will not decide a constitutional question unless such construction is absolutely necessary; and in the Mahoney case, since the appellants were aliens, and claimed no protective rights as citizens, no constitutional question was involved. It would have been sufficient in disposing of their appeal to have said, as was said by the federal court in the case last cited, "When a nonresident of the states assails the constitutionality of a statute upon the ground that it denies to him a privilege granted to the citizens of this state, it will be time enough to consider the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law." As the Supreme Court of the United States has said in

Chicago Ry. Co. vs. *Wellman*, 143 U. S. 339, "But exercise of the power to declare the statute unconstitutional and void is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals." Still further, as hereinafter will be shown, the decision in the Mahoney case rested upon illegal assumptions of both appellants and respondent, and was therefore invited error. The appellants' first contention was, as expressed by the commissioner in the opinion in the Mahoney case, "That legacies to nephews and nieces are exempt from the collateral inheritance tax, whether they reside in this state or not." This contention was a claim that section 2 of article IV of the constitution of the United States secured not merely to citizens of other states the immunities and privileges granted by a state to its own citizens, but secured the same to aliens, to residents of territories, and to citizens of the United States who are not citizens of any state, none of which classes comes under the protecting shield of the constitution. The appellants' second contention in the Mahoney case was, that the court should strike out from the amendment the clause "when a resident of the state," upon the assumption that because it favored citizens of the state it was violative of the constitution of the United States, and therefore void. This assumption was admitted by respondents and accepted in the opinion, respondents contending merely that the clause "when a resident of the state" was inseparable from the amendment, and the court must strike out the whole amendatory clause, namely, "and nephews and nieces when a resident of the

state," and the opinion adopted the latter view, which was perfectly sound, upon the assumption that the exemption of resident nephews and nieces was in and of itself unconstitutional. But that such privilege or benefit conferred by a state upon its own citizens as expressed by this law, was not unconstitutional, we think is demonstrable upon principle as well as upon all abjudications.

Section 2 of article IV of the constitution of the United States declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." In this there is no striking down of or limitation upon the right of a state to confer such immunities and privileges upon its own citizens as it may deem fit. The clause of the constitution under consideration is protective merely, not destructive, nor yet even restrictive. Over and over again has the highest court of the United States so construed this provision. Thus in the Slaughter House Cases (16 Wall. 36) it is said:

> "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

(See, also, *Blake* vs. *McClung*, 172 U. S. 165; *Ward* vs. *Maryland*, 12 Wall. 418.) It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory.

It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, "No citizen of any state shall be granted any immunity not granted to every citizen of every state," or had it begun its declaration by saying that "It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state," it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. Thus it is expressed by Mr. Justice Harlan, in *Blake* vs. *McClung*, 172 U. S. 165; "The object of the constitutional guaranty was to *confer* on the citizens of the several states a general citizenship, and to *communicate* all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances * * *. These principles have not been modified by any subsequent decision of this court." Here, then, in precise terms, and from the highest court of our land, charged with

the duty of construing our governmental law, it is declared that the purpose of the constitutional guaranty is to *confer* and *communicate* all privileges which may thus be granted by a state to its own citizens, a rule of construction obviously radically different from that which would strike down an immunity granted by a state to its own citizens, because in terms such immunity had not been conferred upon citizens of all the states. It is unnecessary that a statute should so expressly provide. The constitution itself becomes a part of the law.

And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing. Thus in Vermont, where a statute exempted certain personal property of residents, but did not so exempt the like property of nonresidents, the tax upon the latter, not the exemption upon the former, was adjudged void, so that nonresidents should enjoy the equal right of exemption. (*Sprague* vs. *Fletcher*, 69 Vt. 69.) And in Massachusetts, where the state law required every corporation to retain and pay to the state one-fifteenth of all dividends payable to stockholders residing outside the state, the Supreme Court of Massachusetts in like manner adjudged the burden void, and extended the exemption to all citizens of sister states. (*Oliver* vs. *Washington Mills*, 11 Allen, 268.) And by the Supreme Court of Alabama the section of the statute imposing a tax upon slaves belonging to residents of other states higher than that im-

posed upon slaves belonging to citizens of the state was adjudged void only as to the burden. And for further instances reference may be made to *Wiley* vs. *Palmer*, 14 Ala. 627; *Fechcimer* vs. *City of Louisville*, 84 Ky. 306; *McGuire* vs. *Tax Collector*, 32 La. Ann. 832; *State ex rel. Hoadley* vs. *Board Ins. Com.*, 37 Fla. 564; *Roby* vs. *Smith*, 131 Ind. 342; *Shirk* vs. *LaFayette*, 52 Fed. 857; *Black* vs. *Seal*, 6 Houst. 541; *Davis* vs. *Pierse*, 7 Minn. 13; *Blake* vs. *McClung*, 172 U. S. 165. In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void. This is a most vital distinction, which is lost sight of in the Mahoney case. Thus the last expression of the legislative will in the amendment of 1897 was to confer an exemption upon citizens of the state of California—a particular class—nephews and nieces. It was the legislative design, clearly expressed, that their property should not be subjected to the burden of the tax, and yet by that decision upon their property is imposed a burden which the legislature not only meant should not be imposed, but from which it expressly declared that the property should be exempted. The result

is the judicial creation and imposition of a burden—a tax—in forthright violation of the declared legislative intent. This a court will never do. It is for the legislature alone to impose burdens by way of taxation. It is never the province or prerogative of a court. The holding in the Mahoney case, striking out the amendment of 1897, imposes a special tax upon citizens of this state, not by legislative enactment, but in the teeth of the express legislative prohibition. It is a canon of construction that an act of the legislature will yield to the constitution so far as necessary, but no further. (*Scott* vs. *Flower*, 61 Neb. 620.) The constitutional immunity goes only to citizens of sister states, and there is a clear distinction thus recognized between citizens of the states and citizens of the United States who are not citizens of any state, as well as citizens of alien states. (*Murray* vs. *McCarty*, 2 Munf. 393.) By virtue of the constitution of the United States, the immunity which the legislature by the amendment of 1897 conferred upon citizens of this state is extended to citizens of sister states, but the immunity goes no further. Citizens of territories, of the District of Columbia, and of our new possessions, as well as aliens, are not exempted, and their property is thus liable for the tax.

The case of *Sprague* vs. *Thompson*, 118 U. S. 90, cited in the opinion in the Mahoney case, is expressly in point upon this question. There the act of Georgia provided that shipmasters of all vessels bearing toward the ports of Georgia, excepting coasters of the state, etc., refusing to accept a pilot, shall be liable to pay, etc. The manifest and express design of this law was to impose a burden upon all vessels entering the ports of Georgia, excepting those

owned by its citizens. It came in direct conflict with section 4237 of the Revised Statutes of the United States. That section was enacted in exercise of the commerce power of Congress, and provides that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage between vessels sailing between ports of one state and vessels sailing between ports of different states, or any discrimination, * * * and all existing regulations or provisions making any such discriminations are annulled and abrogated." Those provisions had to do wholly with the commercial relations existing between states. Section 4237 prohibited the enactment of statutes of a certain description, and provided that by their terms they must not discriminate in the particulars mentioned. Herein there was no question of conferring benefits. It was the question of imposing illegal exactions, and the supreme court of the United States declared that the effort of the state of Georgia so to do was void. Up to this point the decision could have been taken for granted. The law was plain, almost commonplace, but in the argument an attempt was made to have the supreme court uphold the whole law by striking out the exception, and this it refused to do upon the ground not that they were not separable, but that in eliminating the exception a burden was imposed upon a class, when the legislature never had intended to impose it. In this sense the provisions were inseparable, and the whole section was annulled. In the case at bar we have the expression of the legislative intent to confer a certain immunity upon citizens of this state. By force of the constitution of the United States, that immunity is extended to all

citizens of sister states, leaving, as liable for the burden of the tax, the property of all other nephews and nieces, aliens and citizens of the United States, who are not citizens of any particular state.

The order is therefore reversed, with directions to the court to enter its order in conformity with the foregoing views.

SHAW, J., ANGELLOTTI, J., MCFARLAND, J., VAN DYKE, J., and LORIGAN, J., *concurred.*

DISSENTING OPINION.

BEATTY, C. J., *dissenting*: I dissent. The Mahoney case (133 Cal. 180), which is overruled by the present decision, was, in my opinion, correctly decided. It may be that the reasoning of the opinion in the former case was somewhat inconclusive, but I think the reasoning of the present opinion is quite as unsatisfactory. My own view of the case may be very briefly stated. There was a law—the act of 1893—of undoubted validity which imposed an inheritance tax upon the distributive shares of all nieces and nephews. That law could not be repealed by an unconstitutional act; and if the act of 1897 is unconstitutional, as held in the Mahoney case, the law of 1893 is still in force. Was the act of 1897 unconstitutional? I do not hold that it was unconstitutional because in conflict with the constitution of the United States; for I concede that where a state, by a law free from any conflict with its own constitution, confers a right or immunity upon its own citizens, the sole effect of the constitution of the United States is to make the citizens of other states equal participants in the same right or immunity. But if an act is in conflict with the state constitution, it confers no right or immunity upon the citizens of the state, and there

is nothing for the constitution of the United States to operate upon. This, in my opinion, is the proposition which has been overlooked in the present case, as it was in the Mahoney case. To my mind, the act of 1897 is plainly in conflict with the constitution of California.

* * * * * * *

In the opinion of the court it is said that the result of holding the act of 1897 unconstitutional "is the judicial creation and imposition of a burden—a tax—in the forthright violation of the intention of the legislature," etc., and the case of *Sprague* vs. *Thompson*, 118 U. S. 90, is cited in support of this proposition. The distinction between that case and this is to my mind very plain. The law of Georgia, there considered, was the first law on the subject. Before its enactment there had been no law imposing pilotage charges upon any one refusing the services of a pilot, and the first law by which the legislature of Georgia attempted to impose such charges upon citizens of other states exempted by express provision the citizens of Georgia, South Carolina, and Florida. Counsel attempting to uphold the law were of course obliged to concede that the discrimination attempted could not be enforced, but they contended that the exemption should be struck from the law as invalid, and thus leave it undiscriminating. The Supreme Court very properly said this is something we can not do, because the legislature of Georgia has never imposed, or manifested any intention to impose, this burden upon its own citizens, and the courts can not do so without usurping legislative functions. This was correctly and justly said; for though a court does not exceed its functions in preventing discrimination by declaring void a discriminating statute, it would

be usurping legislative power if it attempted to prevent discrimination by extending to a whole class the provisions of a statute which in terms excludes a portion of the class.

In this case, to declare the act of 1897 wholly void would not be to add anything to a statute for the purpose of keeping it alive. We should only be doing what we continually do in invalidating unconstitutional legislation. And if the effect of invalidating an amendatory act is to leave in its original form the act which the legislature attempted to amend, this is not to legislate; it is only to say, as we so often say, the legislature has failed to pass a valid act.

The judgment of the superior court should be affirmed.

EXHIBIT D.

PORTIONS OF OPINION ON REHEARING BELOW IN THE CASE AT BAR, 192 PAC. 1021, RELEVANT TO THE PROPOSITION THAT THE EFFECT OF ARTICLE IV, SECTION 2 OF THE FEDERAL CONSTITUTION IS TO EXTEND TO NONRESIDENTS THE PRIVILEGES CONFERRED BY STATES UPON THEIR OWN RESIDENTS.

QUONG HAM WAH CO. VS. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA, ET AL.

Quoting from p. 1027:

[8] It is contended, however, and correctly, that the provisions of the federal constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the state legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister states. In support of this contention respondents rely upon *Estate of Johnson*, 139 Cal. 532. No good reason has been advanced for departing from the doctrine therein declared as follows: "It will be noted, not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said,

'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. * * * The constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing." This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the *Slaughter House Cases*, 16 Wall. 36, 77, in the following words: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own

citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

[9] The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to nonresidents of the state, and clearly the statute in question does not impose nor attempt to impose upon noncitizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all important in controlling the construction and application of that provision of the federal constitution which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." For, where a state endeavors to place a burden upon noncitizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own

citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens and, therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen. Viewed in this light, it is clear that, when a state statute imposes a burden on a noncitizen which is not imposed on the citizen of the state, the noncitizen may have relief from the burden thus imposed by invoking the provision of the federal constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a noncitizen, the latter finds relief in the provision of the federal constitution which, by operation of law, so to speak, extends the privilege to him. The obvious resulting difference in the operation and effect of the federal constitutional provision under discussion, is the paramount point of the decision in the *Estate of Johnson, supra*, and it can not be said that the extension to noncitizens of a statutory privilege granted only to citizens is judicial legislation, for clearly it is the federal constitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, noncitizens of the state shall likewise be "entitled" to them. The case of *Spraigue* vs. *Thompson*, 118 U. S. 90, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception and thereby make the statute effective as to a class which the legislature did not have in mind, has application only to that class of cases where it is attempted by the state to put a burden upon nonresidents. That case has no application to the extension to nonresidents of a privilege granted

to residents, and, apparently, has never been applied to the latter situation.

The very recent case of *Travis* vs. *Yale & Towne Mfg. Co.*, 40 Sup. Ct. Rep. 228, is relied upon in support of the contention that *Estate of Johnson, supra*, has been overruled by the Supreme Court of the United States. At first blush this case would seem to weaken the ruling of this court in *Estate of Johnson*. However, upon a close analysis of the Travis case, it will be found that it in no wise affects the doctrine of *Estate of Johnson*. The facts of the former case, substantially stated, were that the State of New York had imposed an income tax upon residents and nonresidents, but granted an exemption to residents of the state on the first one thousand dollars of their incomes, and further provided that every "withholding agent" (including employers) should deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equaled or exceeded $1000.00 in a year, and should pay the tax to the state comptroller. The court held, in affirmance of the judgment of the District Court of New York made in the first instance, that in granting to residents exemptions denied to nonresidents the statute violated the provisions of section 2 of article IV of the federal constitution, but a careful reading of the decision in that case reveals the fact that the court did not hold that the entire statutory scheme involved in that case was altogether void and nugatory. That is to say, the court did not declare that the statute was invalid in so far as it related to the imposition of a tax which, when freed and cleared of the attempted unwarranted discriminations, operated uniformly upon residents and nonresidents alike. True it is the

court did not, in holding the attempted discrimination unwarranted, declare in terms that the exemptions granted to residents should by the conjunctive operation of the state statute and the fundamental law of the land be extended to nonresidents, but in this behalf it is important to note that neither did the court decide that the statute was wholly invalid, that is to say, that residents and nonresidents entirely escaped the burden of taxation because of the attempted discrimination. That it was not the purpose of the court to so declare is manifest, we think, by the decree rendered in the first instance by the United States District Court of New York and affirmed by the Supreme Court of the United States.

That decree although not set out in the opinion of the supreme court, is before us by the courtesy and consent of counsel for the respective parties in the instant case, and may, therefore, we take it, be rightly referred to in aid of the ascertainment of the scope and effect of the opinion of the Supreme Court. The decree mentioned does not, as counsel for the petitioner here contend, enjoin the State of New York from in any way collecting all or any part of the tax in question from nonresidents. While it does enjoin the collection of the state tax from the complainants who were the "withholding agents" and the source of the income upon which the tax was levied, nevertheless it does not purport to enjoin the collection of the tax, with the discriminations eliminated, directly from resident and nonresident taxpayers. In short, the decree and its affirmance indicate that the court intended to do no more than declare that the discrimination in the granting of exemptions to residents and denying them to nonresidents was, in the language of the Supreme Court itself, "an unwar-

ranted *denial* to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by the citizens of New York." (Italics ours.) In other words, it was the *denial* to residents of other states of exemptions provided in the statute for residents of the State of New York which was declared to be invalidated by the provision of the federal constitution. Inasmuch as the court did not strike down the exemptions in so far as they applied to residents, it follows by necessary implication that, if the exemptions could not be denied to nonresidents and were still extant as to residents, they must be available to nonresidents. This conclusion is confirmed by a perusal of the opinion rendered in the first instance by the District Court, where it was carefully said that: "Nothing herein * * * is meant to be decided as to the validity of the statute so far as it relates to residents of the State of New York," (262 Fed. 576.) This can mean but one thing, and that is, that the act was valid as to residents and binding to the same extent, and only to the same extent, upon nonresident citizens of other states. While the opinion of the District Court can not, of course, control the interpretation to be put upon the opinion of the Supreme Court, nevertheless it is illuminating and persuasive when considered in conjunction with the unqualified affirmance by the court of last resort of the decree of the lower court, despite the limitations which the latter court explicitly put upon its judgment.

In any event, it can not be said from anything contained, either expressly or impliedly, in the Travis decision that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the State of New York. Therefore it seems that the Travis case in no

way contravenes the rule and the reason for the rule enunciated in *Estate of Johnson, supra,* and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimination, the statute itself is valid and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.

LENNON, J.

We concur:
LAWLOR, J.
SLOANE, J.

CONCURRING OPINION.

OLNEY J. : I concur.

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Third—What, under these circumstances, is the effect of the provision of the constitution upon the act: Does it destroy it so that neither citizens nor noncitizens shall have its benefits, or does it operate to extend the benefits to noncitizens, so that they, as well as citizens, are "entitled" to its privileges, and the unlawful discrimination is thus removed? Upon this point I agree thoroughly with both the discussion and the conclusion of the main opinion, and with the *Estate of Johnson,* 139 Cal. 531, to which it refers and upon which it relies. The constitutional provision is couched in the affirmative, that "the citizens of each state shall be *entitled* to all the privileges and immunities of citizens in the several states." When a state endeavors to place a *burden* upon noncitizens but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to

confer upon its citizens *privileges or benefits* not conferred on others, the effect is just the opposite. The citizens of other states become "entitled to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employees, both citizens of this state and those of other states, are entitled to the benefits of the act.

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But the point in such instances as the Estabrook case is that the statute is not void. It is perfectly valid. It is true it contravenes the federal constitution in attempting to withhold its benefits from noncitizens. But it is its attempt to withhold, not to confer, that alone contravenes the constitution and is therefore invalid and ineffective. The law stands as a valid enactment as to citizens, and the constitution operates to destroy its attempt to withhold its benefits from noncitizens and to extend those benefits to them.

CONCURRING OPINION.

SHAW, J.: I concur on the ground that the statute merely confers upon employees residing in this state the privilege of resorting to the Workmen's Compensation Act of this state to obtain compensation for injuries received while in the course of their employment, in all cases where the contract of employment was made in this state, whether the injury was re-

ceived within or without this state, and that the provision of the Constitution of the United States, *ipso facto*, carries this privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect. It must be observed that the statute does not purport to withhold this privilege from citizens of other states; it is merely silent with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But as it does not, the result is that the federal constitution prevents the statute from having the effect of withholding the privilege to citizens of other states. (*Estate of Johnson*, 139 Cal. 532.)

I concur:

ANGELLOTTI, C. J.

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CONCURRING OPINION.

WILBUR, J.: * * * I agree with the majority of the court in holding that, notwithstanding the language of the statute with reference to residents, by virtue of the federal constitution a nonresident of California, if a citizen of the United States, is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California, and would also have jurisdiction of a similar complaint by a nonresident, and that there is, therefore, no such discrimination as is prohibited by the federal Constitution.

WILBUR, J.

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